15-382 ~ 81

Field C. J. Motion to dismiss denied.

Submitted Jan 5. 1872. Affirmed with dam

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~505.~~ 68

CHARLES G. SCOTT, JOHN S. BOSTICK, AND SAMUEL L. GRIFFITH, AS EXECUTORS OF PHILIP PENNYWIT, DECEASED, PLAINTIFFS IN ERROR,

vs.

JOHN EATON AND WILLIAM H. BETTERTON, LATE PARTNERS AS EATON & BETTERTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

FILED FEBRUARY 14, 1871.

SUPREME COURT OF THE UNITED STATES.

No. 505.

CHARLES G. SCOTT, JOHN S. BOSTICK, AND SAMUEL L. GRIFFITH, AS EXECUTORS OF PHILIP PENNYWIT, DECEASED, PLAINTIFFS IN ERROR,

vs.

JOHN EATON AND WILLIAM H. BETTERTON, LATE PARTNERS AS EATON & BETTERTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

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1 In the supreme court of Arkansas.

CHARLES G. SCOTT, JOHN S. BOSTICK, & Samuel L. Griffith, executors of Philip Pennywit, deceased, appellants,
v.
JOHN EATON & WILLIAM H. BETTERTON, partners under the name of Eaton & Betterton, appellees.

To the Hon. W. W. Wilshire, chief justice of said supreme court:

Come the said Charles G. Scott & others, said appellants, and state and show that a judgment has been rendered against them as such executors, in favor of said appellees, by the said supreme court of Arkansas, for over ten thousand dollars, ($10,000 00,) at the present term of said court, that is, on the 12th day of December, 1870, and there were involved in said cause, as will appear from the record thereof, the following questions, viz:

The jurisdiction of a State court to attach steamboats navigating the rivers and waters of the United States, and—

The validity of a judgment rendered in a civil suit between individuals by a judge of a State court, appointed & holding his commission by & under a military govern'r of said State, holding his position by appointment of the President of the United States.

2 And as they believe the decision of said supreme court of Arkansas is erroneous, they pray for a writ of error in said cause to the Supreme Court of the United States, to have said decision reviewed & corrected.

A. H. GARLAND,
For Scott & al.

The prayer of said petition is granted, & the writ of error will issue as asked for.

W. W. WILSHIRE,
Chief Justice Supreme Court of Arkansas.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Arkansas, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Arkansas, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in said court, between Charles G. Scott, John S. Bostick, & Samuel L. Griffith, as executors of Philip Pennywit, deceased, appellants, and John Eaton and William H. Betterton, late partners under the name of Eaton & Betterton, when & where were drawn in question the right of a State court to attach a steamboat navigating the rivers & waters of the United States, and also the validity of a judgment rendered by a judge of a State court in a civil cause, between individuals, where such judge is appointed by, & holds his commission under, a military governor of said State; all of which appears by the record in said cause, manifest error hath happened to the said Scott, Bostick, & Griffith, executors aforesaid, to their great damage, as by the record thereof & their complaint appears, we, being willing that the error, if any hath been

committed, should be duly corrected, and fair and speedy justice be done to the parties aforesaid in this behalf, do command
4 you, if judgment be thereon given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington City, D. C., on the first Monday of December next, eighteen hundred & seventy-one, (1871,) in the Supreme Court of the U. S., to be then & there held, that, the record & proceedings aforesaid being inspected, the said Supreme Court may cause further to done therein to correct the errors, what of right and according to the laws & customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 16th day of December, A. D. 1870.

[SEAL.]

FRANK E. WRIGHT,
Clerk of the United States Circuit Court
for the Eastern District of Arkansas.

Copy of this writ lodged in my office this 16th day of December, A. D. 1870.

N. W. COX,
Clerk Supreme Court of Arkansas.

5 STATE OF ARKANSAS, *ss:*

This writ of error is allowed this the 16th day of December, A. D. 1870, a copy thereof having been this day lodged in the office of the clerk of the supreme court of Arkansas.

W. W. WILSHIRE,
Chief Justice of the Supreme Court of the State of Arkansas.

STATE OF ARKANSAS, *ss:*

We, Watkins and Rose, the attorneys of record for Eaton and Betterton, in the suit named in the foregoing writ of error, do hereby acknowledge service of notice of such writ of error, returnable to the Supreme Court of the United States on the first Monday in December, 1871, to the same extent as if served with a citation, & hereby waive the right to any other service of citation therein, this December 16th, 1870.

WATKINS & ROSE.

6 In the supreme court of Arkansas.

CHARLES G. SCOTT, JOHN S. BOSTICK, AND SAMUEL L. GRIFFITH, as executors of Philip Pennywit, deceased, appellants,
v.
JOHN EATON & WILLIAM H. BETTERTON, LATE partners under the name of Eaton & Betterton, appellees.

Know all men by these presents that we, Charles G. Scott are held and firmly bound unto John Eaton & William H. Betterton, partners under the name of Eaton & Betterton, in the sum of one thousand dollars, ($1,000 00,) to be paid to the said Eaton & Betterton, partners as aforesaid, their heirs & executors; to which payment, well & truly to be made, we bind ourselves and each of us,

jointly & severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 16th day of December, A. D. 1870.

Whereas the above-named Charles G. Scott and John S. Bostick & Samuel L. Griffith, as executors of Philip Pennywit, deceased, have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment in the above-entitled suit rendered in the
7 supreme court of Arkansas: Now, therefore, the condition is such, that if the above-named Charles G. Scott, John S. Bostick, & Samuel L. Griffith, executors aforesaid, shall prosecute said writ of error to effect, and answer all costs if they shall fail to make good their plea, then this obligation shall be void.

Witness our hands & seals the date above written.

CHARLES G. SCOTT. [SEAL.]
JAMES LAWSON. [SEAL.]
JOHN ADAMS. [SEAL.]

The foregoing bond approved this December 16th, 1870.

W. W. WILSHIRE,
Chief Justice Supreme Court of Arkansas.

8 Be it remembered that, at a term of the supreme court of the State of Arkansas, began and held at the court-house, in the city of Little Rock, on Monday, the 5th day of December, A. D. 1870, among other proceedings had were the following:

CHARLES G. SCOTT, executors of the estate of Philip Pennywit, dec'd, appellants,
vs.
JOHN EATON AND WILLIAM H. BETTERTON, late partners under the firm-name of Eaton & Betterton, appellees.
} Appeal from Pulaski circuit court.

Be it remembered that, on the second day of December, 1867, there was filed in said supreme court the following transcript, to wit:

Pleas before the Honorable Liberty Bartlett, judge of the fifth judicial circuit of the State of Arkansas, in the circuit court of Pulaski County, on the 25th day of October, 1867, in the following entitled cause, to wit:

JOHN EATON AND WILLIAM H. BETTERTON, late partners, under the firm-name of Eaton & Betterton, plaintiffs,
vs.
PHILIP PENNYWIT, DEFENDANT.
} Debt.

Proceedings had April 2d, 1866.

EATON & BETTERTON, PLAINTIFFS,
v.
PHILIP PENNYWIT, DEFENDANT.
} Debt.

Come said plaintiffs, by attorney, and by leave of court file herein
9 their declaration in this case, and, on their motion, it is ordered that a writ of summons issue herein, returnable to the next term of this court.

Declaration.

PULASKI COUNTY, *to wit:*

In the Pulaski circuit court, at March term, 1866.

JOHN EATON AND WILLIAM H. BETTERTON, late partners under the firm-name of Eaton & Betterton, plaintiffs,
vs.
PHILIP PENNYWIT, DEFENDANT.
} Debt.

John Eaton and William H. Betterton, late partners, doing business under the firm-name of Eaton and Betterton, complain of Philip Pennywit, of a plea that he render unto them, the said Eaton & Betterton, the sum of six thousand seven hundred and ninety-five dollars and seventy-one cents, with interest thereon at the rate of eight per centum per annum from the eighth day of October, eighteen hundred and sixty-one, which he owes to and unjustly detains from them; for that whereas the said plaintiffs heretofore, to wit, on the twelfth day of January, eighteen hundred and sixty-four, in the fourth district court of New Orleans, in the State of Louisiana, by the style and description of Eaton & Betterton, a commercial firm composed of John Eaton and W. H. Betterton, by the consideration and judgment of the said court, recovered against the said defendant by his name and description of P. Pennywit, (and Levi Chapman, Ed. C. Carter, and William M. Ensign, not now sued,) the sum
of six thousand seven hundred and ninety-five dollars and seven
10 one cents, with interest thereon at the rate eight per centum per
annum from the eighth day of October, eighteen hundred and sixty-one; which said judgment, on the petition of the said plaintiff' by them filed in the said court by the style of Eaton & Betterton, composed of John Eaton and W. H. Betterton, on the said twelfth day of January, eighteen hundred and sixty-four, was rendered as aforesaid, and was signed on the sixteenth day of January, 1864, by which the sum aforesaid was adjudged to the said plaintiffs, whereof the said defendant (and the said Levi Chapman, Ed. C. Carter, and William M. Ensign, not now sued,) were convicted, as by the record and proceedings thereof remaining in the said fourth district court of New Orleans, in said State of Louisiana, more fully appears, which said judgment still remains in full force and effect, not reversed, satisfied, or otherwise vacated. And the said plaintiffs have not obtained any execution or satisfaction of or upon the said judgment so recovered as aforesaid, whereby an action hath accrued to the said plaintiffs to demand and have of and from the said defendant the said sum of six thousand seven hundred and ninety-five dollars and seventy-one cents, with interest thereupon at the rate of eight per centum per annum from the 8th day of October, 1861, above demanded.

Yet the said defendant, (though often requested so to do,) hath not (nor have the said Levi Chapman, Ed. C. Carter, and William M. Ensign, or either of them,) as yet paid the said sum of six thousand seven
hundred and ninety-five dollars and seventy-one cents, and the
11 said interest accrued thereupon, or any part of either, to the said
plaintiffs, or to either of them; but he to do this hath hitherto wholly refused, and still doth refuse, to the damage of the said plaintiffs ten thousand dollars; and therefore they bring this suit, &c,

WATKINS & ROSE.

(Endorsed:) Declaration. Filed 2d April, 1866, before writ issued. John W. Jay, clerk, by Tho. H. Walker, D. C.

[Rev. stamp, 50cts.]

Summons.

STATE OF ARKANSAS, *County of Pulaski, set:*

The State of Arkansas to the sheriff of Pulaski County, greeting:

You are hereby commanded to summon Philip Pennywit, if he be found in your county, to appear before the judge of our circuit court of Pulaski County, at the the court-house, in the county aforesaid, on the first day of our next September term, at a court to be holden on the fourth Monday after the fourth Monday of August, 1866, then and there to answer John Eaton and Wiliam H. Betterton, late partners, doing business under under the firm-name of Eaton & Betterton, of a plea that he render unto them, the said Eaton & Betterton, the sum of six thousand seven hundred and ninety-five dollars and seventy-one cents, with interest thereon at the rate of eight per centum per annum from the eighth day of October, eighteen hundred and sixty-one, which he owes to and injustly detains from them, to their damage ten thousand dollars; and that you make due returns of this writ to said
12 court with an endorsement thereon in what manner you shall have executed the same.

In testimony I, John W. Jay, clerk of the said circuit court, have hereunto set my hand and affixed the seal of said court at my office, this first day of June, A. D. 1866.

[L. S.]

JOHN W. JAY, *Clerk*,
By THO. H. WALKER, *D. C.*

Sheriff's return.

THE STATE OF ARKANSAS, *County of Pulaski, ss:*

I have this 23rd day of August, A. D. 1866, at Little Rock, duly served the within by delivering a true copy of the same to the within named Philip Pennywit, as therein commanded.

Fees: Service, 50; mileage, 6; return, 25—8' 81.

J. R. R. ADAMS, *Sheriff*,
By J. W. RISON, *Deputy.*

Proceedings had September 27th, 1866.

EATON & BETTERTON, PLAINTIFFS,
v.
PHILIP PENNYWIT, DEFENDANT. } Debt.

This day come said plaintiffs, by attorney, and by leave of court file their bond for costs in this case.

Bond for costs.

Know all men by these presents that I, U. M. Rose, am held and
13 firmly bound unto Philip Pennywit, in the just and full sum of ten thousand dollars; payment whereof well and truly to be made I bind myself, my heirs, executors, and administrators, firmly by these presents.

The condition of the above obligation is such, that whereas John Eaton and William H. Betterton, late partners doing business under the firm-name of Eaton & Betterton, have instituted an action of debt in the Pulaski circuit court, against said Philip Pennywit, wherein damages are laid at the sum of ten thousand dollars:

Now shall I well and truly pay all costs which have accrued or which may hereafter accrue in the said action, then the above obligation to be null and void.

U. M. ROSE. [SEAL.]

Filed Sept. 27th, 1866.

JOHN W. JAY, *Clerk*,
By THO. H. WALKER, *D. C.*

Proceedings had October 2d, 1866.

EATON & BETTERTON, PLAINTIFFS,
v.
PHILIP PENNYWIT, DEFENDANT. } Debt.

This day comes said defendant, by attorney, and, by leave of court, files his two pleas in this court.

Def't's 2 pleas.

Pulaski circuit court. Sept. term, 1866.

EATON & BETTERTON, PL'FFS,
vs.
14 PENNYWIT, DEF'T. } Debt.

Comes said defendant, by attorney, and defends the wrong and injury, &c., and says actio non, &c., because he says that there is not any record of the said supposed recovery in the said declaration mentioned remaining in the said court of the fourth district of New Orleans in the State of Louisiana, in manner and form as said plaintiffs have above in their said declaration alleged; & this the said defendant is ready to verify; wherefore he prays judgment if, &c.

GARLAND, WHITE & NASH,
For Def't.

And for a second and further plea herein, defendant says actio non, &c., because he says that at the time when the suit or motion in which the judgment in the declaration in this behalf mentioned was enumerated, and from thence up to, until, and at the time when the said recovery in the said declaration stated was rendered as aforesaid, said defendant was a citizen of the State of Arkansas and resided and was domiciled therein, and was not a resident or citizen of the State of Louisiana, and said defendant was not served with process in said suit and had no notice whatever of the pendency of the same, and said defendant never appeared to said suit, either in person or by attorney, and no one duly authorized entered his appearance to such suit; and this he is ready to verify; wherefore, &c.

GARLAND, WHITE & NASH,
For Def't.

Flled 2d Oct., 1866.

JOHN W. JAY, *Clk*,
By THO. H. WALKER, *D. C.*

15 Proceedings had May 24th, 1867.

EATON & BETTERTON, PLAINTIFFS,
v.
PHILIP PENNYWIT, DEFENDANT. } Debt.

This day come said plaintiffs, by attorney, and, by leave of court, filed their similiter to the first plea, and their replication to the second plea of the said defendant in this case.

Pl'ffs' similiter.

In the Pulaski circuit court, April term, 1867.

EATON & BETTERTON
v.
PHILIP PENNYWIT. } Debt.

And the said plaintiffs, as to the first plea of the defendant, and whereof he should have put himself upon the country, doth the like.

WATKINS & ROSE.

And as to the second plea of the defendant, the plaintiffs say precludi non, because they say that the defendant had notice of the pendency of the said suit in said declaration mentioned; and this they are ready to verify.

WATKINS & ROSE.

Filed 24th of May, 1867.

THO. H. WALKER, *Clk.*

Proceedings had June 28th, 1867.

EATON & BETTERTON, PLAINTIFFS,
v.
PHILIP PENNYWIT, DEFENDANT. } Debt.

16 This day came the parties, by their attorneys, and both parties agreeing, this cause is submitted to the court without the intervention of a jury, and the evidence being introduced on both sides, and certain instructions as propositions of law applicable to the case being asked, the cause is argued by counsel and submitted to the court, and by the court taken under advisement until the next term of this court, both parties having reserved during the trial all exceptions to rulings and decisions of the court, on receiving evidence in said cause.

Proceedings had 25th October, 1867.

EATON & BETTERTON, PLAINTIFFS,
v.
PHILIP PENNYWIT, DEFENDANT. } Debt.

Come the parties, by their respective attorneys, and the court, to whom this cause was submitted, sitting as a jury, finds the issue joined herein for the defendant.

It is therefore considered by the court that said defendant go hence

hereof without day, and recover of said plaintiffs all his costs in this behalf expended.

Pending the trial of this cause, said plaintiffs excepted to sundry rulings and decisions of the court, and by leave of the court now tender their bill of exceptions in respect thereof, which, being settled and approved, is now signed and sealed and ordered to be filed and form a part of the record in this cause. Whereupon said plaintiffs pray
17 an appeal in this cause to the supreme court from the judgment aforesaid, and the affidavit for appeal being waived by the defendant, it is ordered by the court that said appeal be, and the same is hereby, granted and allowed.

Pl'ffs' bill of exceptions.

ARKANSAS, *to wit:*

In the Pulaski c't c't, at Sept. term, 1867.

EATON & BETTERTON, PLAINTIFFS,
v.
PHILIP PENNYWIT, DEFENDANT. } Debt.

Be it remembered that, during the progress of the trial of this cause, before the court sitting as a jury, the said plaintiff, to maintain the issue joined herein, offered on their part and read in evidence an exemplification of the record of the judgment mentioned in their declaration, and on which this suit is founded, and to the introduction of which, as evidence said defendant objected. Said defendant then proved by Charles G. Scott, a witness in this behalf, that said defendant, from the first day of July, 1861, to the first day of July, 1864, was a citizen of the State of Arkansas, resident therein, and during that time was not in the State of Louisiana, and to the introduction of which testimony said plaintiffs objected at the time, and which was all the evidence adduced by either party on the trial of this cause, and which was so read, heard, and adduced, subject to said objections thereto, respectively.

Whereupon said plaintiffs moved the court to declare its opinion of the law in this case as follows:

18 1. The plaintiffs move the court to declare the law to be that the record adduced in evidence shows a valid judgment in favor of the plaintiffs against the defendants thereto, in personam, in the 4th district court of New Orleans, including the defendant here sued, and that the evidence admitted on the part of said defendant does not in law raise any presumption sufficient to invalidate said judgment as against the defendant here sued.

And said defendant also moved the court to declare its opinion of the laws in this case as follows:

"The defendant moves the court to find the following propositions to be the law applicable to this cause.

"1st. If the defendant (Pennywit) was a non-resident of the State of Louisiana when said suit was brought in the 4th district of New Orleans, and continued so to be during the pendency of said suit, until and after such judgment was rendered, and said (defendant) Pennywit was not served personally with notice of such suit, or waived such service of notice, such judgment is not binding on him, and the finding must be for the defendant.

"2d. If the evidence in the case shows the *am't* in which such judg-

ment was rendered had no jurisdiction of the person of said defendant, and he did not enter his appearance to the suit in which such judgment was given, or to do some act equivalent thereto, such judgment does not bind said defendant, & the finding must be for him.

"3rd. That the rule is to require personal service upon the
19 party to be bound by a judgment, and to dispense with that, his appearance to the suit, or any act waiving such service, must be clear & unequivocal; and when it appears that process has not been executed upon the defendant personally, there must be some substantive act by the defendant to constitute him a party to the suit.

"4th. That the appearing of Levi Chapman, one of the defendants sued in the said 4th district court of New Orleans, & giving bond to dissolve the attachment, & the dissolving said attachment did not bind said Pennywit, nor did it make him a party to said suit.

"5th. That if the evidence shows the suit in which said judgment sued on in this cause was a proceeding in rem against the steamboat 35th Parallel, & the process issued therein was to enforce such a proceeding, if said Pennywit, as one of the owners of such steamboat, was then a non-resident of the State of La., and had no personal notice of such suit, or did no substantive act to make himself a party thereto, then such judgment has no extra-territorial force, & binds, only so far as defendant is concerned, his interest in said steamboat.

"6th. That, even to make a good and valid constructive notice of the pendency of a suit, such as by publication, every requisite must be strictly complied with, & the record must show the same & leave nothing to be intended or inferred.

"7th. If the transcript of the judgment sued on in this cause shows that such judgment was had & recovered under proceedings instituted
under the laws of the State of Louisiana, authorizing attachments
20 against steamboats in the courts of said State, said judgment is of no force to bind said defendant, and the finding must be in his favor."

And now upon consideration whereof the court is of opinion, and accordingly decides that the objection of the defendant to said exemplification of record be sustained, and the same excluded as evidence in this cause, and that the objection of said plaintiffs to the testimony of said witness be overruled, and the same admitted as evidence herein; and the court also refused to declare the law to be as asked for by said plaintiff, and declared the law to be as asked for by the defendant as aforesaid.

To which several opinions, judgments and proceedings of the court, and each and every of them said plaintiffs excepted at the time, and said exemplication of record being marked A is ordered to be filed, and, by consent of parties, deemed and taken to be a part of this bill of exceptions as fully as though the same were herein incorporated.

(Said exemplification of record is as follows:)

STATE OF LOUISIANA,
Fourth District Court of New Orleans:

EATON & BETTERTON
vs.
LEVI CHAPMAN AND OTHERS.

Affidavit of attachment.—Filed January 3d, 1862.

21 John Eaton, a member of the commercial firm of Eaton & Betterton, domiciled in New Orleans, being duly sworn, declares

that Levi Chapman, Edward C. Carter, William M. Ensign, and P. Pennywit are justly indebted, jointly and severally, unto affiants, firm of Eaton and Betterton, in the full sum of six thousand seven hundred and ninety-five dollars and seventy-one cents with interest, &c.; that the said debt is now due and owing, and that said Chapman, Carter, Ensign, and Pennywit all reside out of the State of Louisiana.

(Signed) JOHN EATON.

Subscribed and sworn to this 3d day of January, 1862, before me.

(Signed) D. F. MITCHELL, *2nd J. P.*

Order.

Let a writ of attachment issue in this case as herein prayed for, and according to law, on plaintiffs' giving bond with good and solvent security in the sum of eleven thousand dollars, conditioned as the law directs.

New Orleans, January 3d, 1862.

(Signed) J. O. CHALON, *Clerk.*

Bond.—Filed 3d January, 1862.

Know all men by these presents that we, Eaton & Betterton, as principals, and Hu. Kennedy, as security, of the city of New Orleans, and State of Louisiana, are held and firmly bound unto Levi Chapman, Ed.
22 C. Carter, William Ensign, and P. Pennywit, in the sum of eleven thousand dollars, lawful money of the United States of America, to be paid to the said Levi Chapman, Ed. C. Carter, William Ensign, and P. Pennywit, heirs, executors, administrators, and assigns; for which payment, well and truly to be made, we bind ourselves, and each of us by himself, *and each of us by himself*, and each of our heirs, executors, and administrators firmly by these presents, sealed with our seals and dated the third day of January, in the year of our Lord, 1862.

Whereas the said Eaton & Betterton have this day presented a petition to the honorable the fourth district court of New Orleans, praying a writ of attachment, &c.: Now, the condition of the above obligation is, that we, the above-bound Eaton and Betterton and Hu. Kennedy will well and truly pay to the said Levi Chapman, Ed. C. Carter, William M. Ensign, and P. Pennywit, the defendants in said attachment, all such damages as they may recover against us, in case it should be decided that the attachment was wrongfully obtained.

(Signed) EATON & BETTERTON. [SEAL.]
HU. KENNEDY. [SEAL.]

Petition.—Filed 4th January, 1862.

Fourth district court of New Orleans.

23 EATON & BETTERTON
vs.
LEVI CHAPMAN. } No. 15200.

To the honorable the judge of the fourth district court of New Orleans:

The petition of Eaton and Betterton, a commercial firm domiciliated in this city, composed by John Eaton and W. H. Betterton, both of whom reside in this city, respectfully shows that they are holders and owners of a promissory note, dated at New Orleans, on the 8th day of

October, 1861, and payable one day after date, for the sum of six thousand eleven hundred and ninety-five dollars and seventy-one cents, with interest at 8% from the date thereof; that said note was given for cash, and stores furnished to the steamboat "Thirty-fifth Parallel," and is drawn by Levi Chapman, Ed. C. Carter, William M. Ensign and P. Pennywit, the owners of said boat, and who, jointly and severally, promised to said note and interest, but who have neglected, and still refuse to pay said note, though amicably demanded—said note being long past maturity; and the note is hereto annexed for reference.

Your petitioners show that all said debtors reside out of the State of Louisiana, but that one of them, Levi Chapman, is now within the jurisdiction of this hon. court, together with their property, the said steamboat "Thirty-fifth Parallel."

24 Wherefore, your petitioners pray that, in consideration of the annexed bond and affidavit, a writ of attachment issue against the property of said debtors; that they be cited to appear and answer this petition; that, after due proceedings, said Levi Chapman, Ed. C. Carter, W'm M. Ensign, and P. Pennywit be condemned jointly, severally, and in solido, to pay petitioners' said sum of six thousand seven hundred and ninety-five dollars and seventy-one cents, with 8 % interest, from date of said note until paid, with privilege on said boat; and that the court will adjudge the petitioners to be paid the amount of their judgment, by privilege and preference, out of the proceeds of the sale of said boat "Thirty-fifth Parallel;" that the attachment herein be made perpetual, and that the defendants be condemned to pay the costs of this proceeding. And your petitioner prays for general relief.

(Signed) JA'S H. VAN DALSON,
Of Counsel.

Note annexed to petition.—Filed 4th January, 1862.

[$6,795 71.] NEW ORLEANS, *October 8th*, 1861.

One day after date, we, jointly and severally, promise to pay to the order of Eaton and Betterton, for value received in cash and stores furnished the steamboat Thirty-fifth Parallel, six thousand seven

25 hundred and ninety-five dollars and seventy-one cents, with eight per cent. interest, from date until paid.

(Signed) LEVI CHAPMAN,
ED. C. CARTER,
W'M M. ENSIGN,
P. PENNYWIT,
Per pro. MOSES GREENWOOD,
Owners of Steamboat 35th Parallel.

Citation.

STATE OF LOUISIANA,
Fourth District Court of New Orleans:

EATON & BETTERTON
vs.
LEVI CHAPMAN AND OTHERS. } No. 15200.

Mr. Levi Chapman and others, owners of steamboat Thirty-fifth Parrallel:

You are hereby summoned to comply with the demand contained in

the petition of which a copy accompanies this citation, or deliver your answer to the same, in the office of the clerk of the fourth district court of New Orleans in ten days after the service hereof.

Witness the Honorable John W. Price, judge of the said court, the 4th day of January, in the year of our Lord 1862.

(Signed) G. LUMINAIS,
Deputy Clerk.

Sheriff's return.

26 Received January 4th, 1862, and on the same day served a copy of this citation and accompanying petition on Levi Chapman, defendant herein, personally.

Returned same day.

(Signed) ROBERT SWAIN,
D'y Sh'ff.

Writ of attachment.—Issued January 3d, 1862.

Fourth district court of New Orleans.

The State of Louisiana to the sheriff of the parish of Orleans, greeting:

Whereas due proof has been made before the fourth district court of New Orleans by John Eaton, a member of the firm of Eaton & Betterton, that Levi Chapman, Ed. C. Carter, William M. Ensign, and P. Pennywit, are justly indebted unto his said firm in the sum of six thousand seven hundred and ninety-five $\frac{71}{100}$ dollars, &c., and that the said debtors, Levi Chapman, Ed. C. Carter, William M. Ensign, and P. Pennywit reside permanently out of the State of Louisiana:

Now, therefore, you are commanded, in the name of the State of Louisiana and of the fourth district court of New Orleans, to seize and attach, according to law, and take into your possession the goods and chattles, lands and tenements, rights and moneys, effects and credits of the said debtors, if any you find in your parish, to the amount of
27 what will suffice to discharge the said debt and costs of suit; and that you give notice of this proceeding by leaving a copy thereof at the last place of abode of the said defendants, if in said parish, and cause a copy thereof to be affixed at the door of the parish church of said parish. And make a return of this writ, and endorse thereon the manner in which you have executed it, before our court, according to law.

Clerk's office court aforesaid, this 3rd day of January, 1862.

(Signed) G. LUMINAIS,
Deputy Clerk.

Sheriff's return.

Received January 3d, 1862, and on the same day, month and year, I served this writ on the Steamer Thirty-fifth Parallel, her tackle, apparel, machinery, and furniture, and posted copies of this writ on the door of the room in which this hon. court is held and to the wall of the church of St. Louis, parish of Orleans. And on the fourth day of the same month and year, said seizure was released, the defendants having furnished the annexed bond in the sum of ten thousand six hundred and eighty-five dollars, ($10,685 00,) with R. W. Adams and Moses Greenwood as sureties, which bond, as well as the consent of the attorney

for plaintiffs accepting said sureties, is hereto annexed and made
28 part of this return. Returned same day.
(Signed) J. P. WALDEN, *Sh'ff.*

Notice of seizure.

STATE OF LOUISIANA :

NEW ORLEANS *3d January*, 1862.

EATON & BETTERTON
vs.
LEVI CHAPMAN ET ALS. } No. 15200.

SHERIFF'S OFFICE, PARISH OF ORLEANS.

In the fourth district court of New Orleans.

To captain and owners of Steamboat Thirty-fifth Parallel :

Please to take notice that, by virtue of a writ of attachment issued in the above-mentioned suit, I have seized and taken into my possession the Steamboat Thirty-fifth Parallel, her tackle, apparel, and furniture.
(Signed) ROBERT SWAIN,
D'y Sh'ff.

Return to writ of seizure.

On the 3d January 1862, served a copy of this notice on Captain Chapman, of Steamboat Thirty-fifth Parallel personally.
(Signed) ROB'T SWAIN,
D'y Sh'ff.

29 *Letter of instructions to the sheriff.*

JANUARY 4TH, 1862.

JOHN P. WALDEN, *Sheriff.*

SIR : You are hereby authorized to accept Moses Greenwood and R. W. Adams as sureties in solido for the release of the steamer 35th Parallel, attached in this suit of Eaton & Betterton vs. Levi Chapman and others, in the fourth district court of New Orleans.
(Signed) EATON & BETTERTON.

J. H. VAN DALSON,
Att'y for Plaintiffs.

Bond of release.

Know all men that we, Levi Chapman, as principal, and Moses Greenwood and R. W. Adams, as sureties, are held unto Jno. P. Waldren, sheriff of the parish of Orleans, in the State of Louisiana, in the penal sum of ten thousand six hundred and eighty-five dollars, for the payment whereof to the said Jno. P. Waldron, sheriff, his executors, administrators, or assigns, we, jointly and severally, bind ourselves, our heirs, executors, and administrators, respectively, by these presents, as witness our respective names hereunto affixed at New Orleans this fourth day of January, in the year of our Lord 1862.

Whereas, in and by virtue of a writ of attachment issued out of the

honorable the fourth district court of New Orleans, at the suit of
30 Eaton & Betterton vs. Levi Chapman and others, and numbered 15200 on the docket of the said court, and which suit is now pending therein, the following described property, to wit, the steamer 35th Parallel, her tackle, apparel, machinery, and furniture, has been seized, taken into custody by the said sheriff, and detained according to law; but the same has been released, and attachment therein set aside, upon the appearance of the defendants in the said suit and delivering to the said Jno. P. Waldren, sheriff, the present obligation:

The condition of which is such, that if the said defendants shall satisfy such judgment as may be rendered against them in the suit pending, as above mentioned, then this obligation to be void; or else to remain in full force.

LEVI CHAPMAN.
MOSES GREENWOOD.
R. W. ADAMS.

Signed and delivered in presence of—
EDW. S. WURZBURGER.

Transfer of bond.

SHERIFF'S OFFICE, PARISH OF ORLEANS,
New Orleans, Jan. 4, 1862.

I do hereby transfer and assign and set over unto the plaintiffs, Eaton & Betterton, all my rights, title, and interest in and to the within bond.

31 For JNO. P. WALDREN, *Sheriff*,
G. WALDREN, *Dy Sheriff.*

Filed January 4th, 1862.
(Signed) J. O. CHALON, *Clerk.*

Default.

Fourth district court of New Orleans.

EATON & BETTERTON
v.
LEVI CHAPMAN AND OTHERS. } No. 15200.

WEDNESDAY, *Jan.* 15*th*, 1862.

Present, Hon. J. W. Price, judge.

On motion of Shackleford, esq., attorney on behalf of J. H. Van Dalson, attorney for plaintiffs, and, on showing that defendants have failed to answer, though duly cited,

It is ordered that judgment by default be herein entered against them.

Default set aside.

On motion of Durant and Horner, of counsel for defendants, and on filing their answer,

It is ordered that the default entered herein this day be set aside.

Answer.—Filed 15th January, 1862.

32 Fourth district court of New Orleans.

EATON & BETTERTON
vs.
LEVI CHAPMAN AND OTHERS. } No. 15200.

Now come the defendants, by their attorneys, and deny all and singular the allegations in plaintiffs' petition contained.

Wherefore they pray for judgment in their favor, with costs, and all further general and equitable relief.

(Signed) DURANT & HORNER,
Att'ys for Defendants.

Continuance.

Fourth district court of New Orleans.

EATON & BETTERTON
vs.
LEVI CHAPMAN AND OTHERS. } No. 15200.

THURSDAY, *January 15th*, 1863.

Present, Hon. J. S. Whitaker, judge.

On motion of Durant & Horner, of counsel for defendants,

It is ordered that this case be continued indefinitely.

Trial and judgment.

Fourth district court of New Orleans.

33 EATON & BETTERTON
vs.
LEVI CHAPMAN AND OTHERS. } No. 15200.

TUESDAY, *January 12th*, 1864.

Present, Hon. J. S. Whitaker, judge.

This case came up for trial this day—John Henderson, esq., att'y for plaintiff; Durant & Horner, atty's for defendants.

Plaintiffs offer in evidence the note sued on and annexed to petition. (See pages , where it is copied in full.)

The evidence adduced in this case having satisfied the court of the justice of plaintiffs' claim,

It is therefore ordered, adjudged, and decreed that the plaintiffs, Eaton and Betterton, do have and recover from the defendants in suit, Levi Chapman, Ed. C. Carter, William M. Ensign, and P. Pennywit, in solido, the sum of six thousand seven hundred and ninety-five dollars and seventy-one cents, with 8 % interest from date of said note until paid, with privilege, as is granted in cases of attachment.

Judgment rendered January 12th, 1864.

Judgment signed January 16th, 1864.

(Signed) J. S. WHITAKER,
Judge.

STATE OF LOUISIANA,
Fourth District Court of New Orleans:

I, O. W. Austin, clerk of said court, certify that the foregoing is a full and complete copy of the whole record therein stated, wherein Eaton & Betterton are plaintiffs, and Levi Chapman and others are defendants, as the same remains of record before the said court at No. 15200 of the docket thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at the city of New Orleans, this sixteenth day of March, in the year of our Lord one thousand eight hundred and sixty-six, and in the nineteenth year of the independence of the United States of America.

[L. S.] O. W. AUSTIN, *Clerk.*

[R. S. 5 cts.]

STATE OF LOUISIANA,
Fourth District Court of New Orleans:

I, Paul E. Theard, sole judge of the court aforesaid, certify that O. W. Austin, by whom the foregoing attestation was made, was, at the date thereof, clerk of said court, duly qualified, and the said attestation is in due form of law and made by the proper officer.

Witness my hand and seal this the sixteenth day of March, in the year of our Lord 1866.

[L. S.] PAUL E. THEARD, *Judge.*

[R. S. 5 cts.]

35 STATE OF LOUISIANA,
Fourth District Court of New Orleans:

I, O. W. Austin, clerk of the court aforesaid, certify that Honorable Paul E. Theard, by whom the foregoing certificate was given, and whose name is thereto subscribed in his own proper handwriting, was, at the date thereof, sole judge of said court, duly commissioned and sworn, and acting.

In witness whereof I have hereunto set my hand and affixed the seal of said court the sixteenth day of March, in the year of our Lord 1866.

[L. S.] O. W. AUSTIN, *Clerk.*

[R. S. 5 cts.]

And to the end that the matters aforesaid may be remembered, said plaintiff now tenders this their bill of exceptions in respect thereof, and prays that the same may be signed and sealed by the judge hereof, and ordered to be filed and made a part of the record in this cause, which is accordingly done in open court this 25th day of October, A. D. 1867.

LIBERTY BARTLETT. [SEAL.]

STATE OF ARKANSAS, *County of Pulaski:*

I, Thomas H. Walker, clerk of the circuit court within and for the county aforesaid, do hereby certify that the preceding thirty-seven pages, and part of this page, contain a full, true, and complete
36 transcript of the record and proceedings of said circuit court in this cause therein mentioned.

In testimony whereof I have hereunto set my hand as such clerk, and affixed the seal of my office this 30th day of November, 1867.

[L. S.] THO. H. WALKER, *Clerk.*

(Endorsed:) No. 61. John Eaton and William H. Betterton, late part., vs. Philip Pennywit. Transcript. Filed 2 Dec., 1867. L. E. Barber, cl'k.

And afterwards, to wit, on the 16th day of December, 1867, the same being a day of the December term, 1867, of the supreme court of the State of Arkansas, among other proceedings had were the following:

EATON & BETTERTON, APPELLANTS,
v.
PHILIP PENNYWIT, DEC'D, APPELLEE. } Appeal from Pulaski c't c't.

Come said appellants, by their attorney, and, on motion, it is ordered that their assignment of errors be filed; and thereupon the same is filed, viz:

In sup. c't Ark's, Dec'r T., '67.

EATON & BETTERTON, APPELLANTS,
v.
PHILIP PENNYWIT, APPELLEE. } Appeal from Pulaski c't c't.

37 Come said appellants, by attorney, and say that, in the record and proceedings in said cause, and in the giving of judg'ts therein, there is manifest error, to wit:

The court erred in excluding the record authenticated under the laws of the United States, and by appellant offered in evidence in said cause; and in admitting the testimony offered by def'ts against the objection of pl'ffs; and in refusing to declare the law as asked by pl't'ff; and in declaring the law to be as asked by def't; and in rendering judgment in said cause in favor of said appellee and against said appellant, whereas, by the law of the land, the judgment aforesaid should have been given for appellant and against said appellee:

Wherefore he prays that the same may be reversed, &c., &c., and he be restored, &c., &c.

WATKINS & ROSE.

And afterwards, to wit, on the 24th day of Dec'ber, 1867, the following proceedings were had in said cause in said court, viz:

JOHN EATON ET AL.
vs.
PHILIP PENNYWIT. } Appeal, &c.

Comes said appellee, by his attorney, and, on motion, it is ordered that his joinder in error be filed; and thereupon the same is filed.

38 *Joinder in error.*

In the supreme court to the December term, A. D. 1867.

Joinder in error.

JOHN EATON & W'M H. BETTERTON, APPELLANTS,
v.
PHILIP PENNYWIT, APPELLEE.

Comes the appellee into court here and says that there is no error either in the record and proceedings aforesaid, and he prays the supreme

court of judicature of the people of the State of Arkansas, before the aforesaid justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed.

GARLAND & NASH,
For Appellee.

And come also said appellants, by their attorney, and this cause is submitted on briefs, and by the court taken under advisement.

And, afterwards, on the 3rd day of February, 1868, the same being a day of December term, 1867, of the court aforesaid, the following proceedings were had, to wit:

JOHN EATON & W'M H. BETTERTON, LATE PARTners, &c., appellants,
vs.
PHILIP PENNYWIT, APPELLEE.
} Appeal from Pulaski c't c't.

This cause came on to be heard upon the transcript of the record of the circuit court of Pulaski County, and was argued by counsel;
39 on consideration whereof it is the opinion of the court that there is error in the proceedings and judgment of said circuit court in this cause, in this:

That said circuit erred in rejecting as evidence the transcript of the record offered in evidence by the plaintiffs therein, and thereupon finding the issues upon the pleas in favor of the defendant.

It is therefore considered by the court that the judgment of said circuit court in this cause rendered be, and the same is hereby, for the error aforesaid, reversed, annulled, and set aside, with costs; and that this cause be remanded to said circuit court for further proceedings to be therein had according to law, and not inconsistent with the opinion herein delivered.

It is further considered, that said appellants recover of said appellee all their costs in this court in this cause expended, and have execution thereof.

And afterwards, on the 10th day of February, 1868, the same being a day of the term of said court last aforesaid, were the following had, to wit:

EATON & BETTERTON, APPELLANTS,
v.
PHILIP PENNYWIT, APPELLEE.

Come said appellants, by their attorney, and file their motion that the court enter judgment on the record.

Motion to enter judgment.

40 In sup. c't. Dec. T., '67.

EATON & BETTERTON
vs.
P. PENNYWIT.

The appellants in this case move the court here to enter judgment on the record.

WATKINS & ROSE.

And afterwards, on the 15th day of February last aforesaid, the following proceedings were had in said court, to wit:

EATON & BETTERTON
v.
PHILIP PENNYWIT.

The court being advised of the motion for judgment in this cause, it is denied.

And afterwards, on the twenty-third day of August, A. D. 1869, Charles G. Scott, John S. Bostick, and Samuel L. Griffith, as executors of the estate of Philip Pennywit, deceased, filed in the clerk's office of the clerk of the supreme court of the State of Arkansas, the following transcript, to wit:

Pleas began and held at the court-house, in the city of Little Rock, county of Pulaski, and State of Arkansas, before the Honorable William Story, judge of the second judicial circuit of Arkansas, presiding, by agreement, on the tenth Monday after the second Monday in
41 March, 1869, being on Monday, the 17th day of May, A. D. 1869.

TUESDAY, *May 26th*, 1868.

JOHN EATON AND WILLIAM H. BETTERTON, late partners under the firm-name of Eaton & Betterton, plaintiffs,
vs.
CHARLES G. SCOTT, JOHN S. BOSTICK, & Samuel L. Griffith, as executors of Philip Pennywit, deceased, defendants.

And now come the plaintiffs, by attorney, Watkins & Rose, and file the mandate of the supreme court herein, which is ordered to be made a part of the record of this cause.

And said plaintiffs suggest and show to the court here, that, since the rendition of the judgment of this cause and reversal thereof in said supreme court, the said defendant, Philip Pennywit, hath departed this life testate, and that the will of said testator has been probated, and letters testamentary thereunder granted and issued in and by the probate court of said county of Pulaski, to Charles G. Scott, John S. Bostick, and Samuel L. Griffith, the executors named in said will.

Whereupon, on motion of said plaintiffs, it is ordered by the court here that a writ of scire facias issue herein, returnable to the ensuing October term of this court, commanding said executors to appear at said term and show cause, if any they can, why this suit should not be served and progress against them as defendants herein.

Copy of mandate.

42 STATE OF ARKANSAS,
In the Supreme Court, set:

Be it remembered that, at a term of the supreme court of the State of Arkansas, begun and held at the court-house, in the city of Little Rock, on the 2nd day of December, A. D. 1867, amongst others, were the following proceedings, to wit:

JOHN EATON AND WILLIAM BETTERTON, late part., &c., appellants,
v.
PHILIP PENNYWIT, APPELLEE.

This cause came on to be heard upon the transcript of the record of the circuit court of Pulaski County, and was argued by counsel; on consideration whereof it is the opinion of the court that there is error in the proceeding and judgment of said circuit court in this cause, in this:

That said circuit court erred in rejecting as evidence the transcript of the record offered in evidence by the plaintiffs therein, and thereupon finding the issues upon the pleas in favor of the defendant.

It is therefore considered by the court that the judgment of said circuit court in this cause rendered be, and the same is hereby, for the error aforesaid, reversed, annulled, and set aside, with costs; and that this cause be remanded to said circuit court for further proceedings to be therein had, according to law, and not inconsistent with the opinion herein delivered.

43 It is further considered that said appellant recover of said appellees all their costs in this court in this cause expended, and have execution thereof.

In testimony that the above is a true copy of the judgment of said supreme court rendered in the case therein stated, I, Luke E. Barber, clerk of said supreme court, hereto set my hand and affix the seal of said court, at my office, in the city of Little Rock, this 25th day of May, A. D. 1868.

[L. S.] LUKE E. BARBER, *Clerk.*

(Endorsements on the foregoing:) Eaton & Betterton vs. Pennywit. Mandate. Filed 26th May, 1868. Tho's H. Walker, clerk.

Copy of writ of scire facias.

STATE OF ARKANSAS, *County of Pulaski:*

The State of Arkansas to the sheriff of Pulaski County, greeting:

Whereas, on the 26th day of May, A. D. 1868, Eaton & Betterton, by their attorneys, Watkins & Rose, did file in the circuit court of said county of Pulaski the mandate of the supreme court of the State of Arkansas, in a certain cause, wherein the said Eaton & Betterton are plaintiffs, and Philip Pennywit was defendant, and suggested and showed to the court that, since the rendition of the judgment in said cause and reversal thereof in said supreme court, the said Philip

44 Pennywit hath departed this life testate, and that the will of said testator has been probated, and letters testamentary thereunder granted and issued in and by the probate court of said county of Pulaski, to Charles G. Scott, John S. Bostick, and Samuel L. Griffith, the executors named in said will; and, on motion of said plaintiff, it was ordered by the court that a writ of scire facias issue, commanding said executors to appear at the next term of said circuit court and show cause, if any they can, why said suit should not be revived, and progress against them as defendants herein.

Now, therefore, you are hereby commanded to summon the said Charles G. Scott, John S. Bostick and Samuel L. Griffith, if they be found within your bailiwick, to appear before the judge of our circuit court of Pulaski County, on the first day of the next term of said,

to be held on the fifth Monday after the fourth Monday of August, 1868, then and there to show cause why said suit should not be revived and progress to final hearing and to trial in their names, as executors of the last will and testament of the said Philip Pennywit, deceased. And that you make due return of this writ to said court with your doings thereon endorsed.

Witness Thomas H. Walker as clerk of said court, and the seal of the said court hereto affixed in the city of Little Rock, this 6th day of July, 1868.

[SEAL.] THO'S H. WALKER, *Clerk.*

45 Which said writ was afterwards returned with the following endorsement thereon, viz:

We acknowledge due and legal service of this writ of scire facias, and will enter the appearance of the within-named executors of Mr. Pennywit, accordingly.

Little Rock, Ark., July 22, 1868.

GARLAND & NASH,
Att'ys for Ex's of Pennywit.

(Endorsement on the foregoing writ:) Eaton & Betterton v. Philip Pennywit. Sci. fa. to revive in name of C. G. Scott, John S. Bostick, and S. L. Griffith, as executors, &c. Watkins & Rose, att'ys.

And again, on Saturday, the 8th day of December, 1868.

EATON & BETTERTON, PLAINTIFFS,
v.
PHILIP PENNYWIT, DEFENDANT. } Debt.

Comes said plaintiffs, and comes also, Charles G. Scott, John S. Bostick, and Samuel L. Griffith, the executor of the last will and testament of said Pennywit, whose death has heretofore been suggested and entered of record, and said executors enter their appearance herein and the case is revived against them, and is ordered to progress as against them; and thereupon the defendants move the court for a continuance of this cause until the next term, for the purpose of taking depositions to prove that the attorneys who appeared for said Pennywit
46 in the district court of New Orleans had no authority in the premises, and said plaintiffs do not resist said motion in writing; and the same is granted by the court: Whereupon it is ordered, that this cause be continued until the next term, with leave to the parties to take depositions.

Again, on Thursday, May 27th, 1869.

EATON & BETTERTON
vs.
SCOTT, GRIFFITH, & BOSTICK, EX'RS OF Philip Pennywit, dec'd. } Debt.

At this time comes the plaintiff, by attorney, and moves the court to publish the depositions on file herein, which is accordingly ordered and done.

And again, on Saturday June 26th, 1869.

EATON & BETTERTON
vs.
SCOTT, GRIFFITH, & BOSTICK, EXECUTORS of Philip Pennywit, dec'd. } Debt.

Copy of agreement.

In the Pulaski circuit court. May term, 1869.

47 EATON & BETTERTON
vs.
SCOTT ET AL. } 25. Debt.

It is agreed that this cause may be submitted to the court instead of a jury, on its pleadings and depositions on file, and on the record of the cause when tried before, as the same appears in the bill of exceptions taken at that trial, including the transcript of the judgment and proceedings of the court of Louisiana.

WATKINS & ROSE,
GARLAND & NASH,
For Def'ts.

(Endorsements on agreement:) 25. Eaton & Betterton v. Scott et al. Agreement to submit the cause. Filed June 26th, 1869. Geo. W. McDiarmid, clerk.

Again, on Thursday, July 1st, 1869.

JOHN EATON & WILLIAM H. BETTERTON, late partners, &c., under their firm-name of Eaton & Betterton,
vs.
CHARLES G. SCOTT, JOHN S. BOSTICK, and Samuel Griffith, as executors of Philip Pennywit, deceased. } Debt.

And now on this day, come the said plaintiffs, by their attorneys, Watkins & Rose, and also said defendants, by their attorneys, Garland & Nash, and neither party requiring a jury, this cause is, by consent of parties, submitted to the court here sitting as a jury for trial of
48 the same upon the issues joined; whereupon the court, after hearing the evidence adduced, and the argument of counsel, doth find for the plaintiffs, and that the said defendants as such executors, justly owe to said plaintiffs the sum of six thousand seven hundred and ninety-five dollars and seventy-one cents for original debt, and the further sum of four thousand one hundred and ninety-eight dollars and seventeen cents damages for the detention of said debt.

And the court, being now well and sufficiently advised of and concerning the premises, and of what judgment to render herein, it is, therefore, considered by the court that said plaintiffs do have and recover of and from the said defendants, as such executors, as well the said sum of six thousand seven hundred and ninety-five dollars and seventy-one cents for original debt, and also the said sum of four thousand one hundred and ninety-eight dollars and seventeen cents, for their damages sustained by reason of the detention of said debt, with interest on said debt and damages at the rate of eight per cent. per annum from

this date until paid; and also their costs in and about their suit in this behalf; and that they have execution thereof.

And during the progress of the trial of this cause the said defendants excepted to sundry rulings and decisions of the court, and now tender their bill of exceptions in respect thereof; and the same is signed and sealed by the judge hereof, and filed and ordered to form a part of the record in this cause.

49 Whereupon the said defendants pray an appeal to the Supreme Court from the judgment and decision of the court in this cause; and the affidavit for such appeal being waived, and, by consent of parties, not required, it is ordered by the court that such appeal be, and the same is hereby, granted.

Copy of bill of exceptions.

In the Pulaski circuit court. May term, 1869.

EATON & BETTERTON
v.
EXECUTORS OF PENNYWIT.

This cause came on to be tried on the first (1st) day of July, 1869, the same being a day of said term, and both parties agreed to submit the same to the court instead of a jury, and to prove the issues on part of the plaintiffs, they read the transcript of the record from the court in New Orleans, as read on the former trial herein, as follows:

(For copy of said transcript, see this transcript, commencing on page 13 and ending on page 28.)

And here both parties agreed to read all matters and things contained in the former bill of exceptions; the same was read on both sides, and said former bill of exceptions is here adopted as part of this.

And, therefore, the plaintiffs read the depositions of Moses Greenwood and John Eaton, on their behalf, which are in the words and figures following, to wit:

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans:

50 Depositions of witnesses taken and subscribed before Mr. A. Shelling, an acting justice of the peace, for the city of New Orleans, State of Louisiana, duly commissioned and qualified as such on the first day of February, A. D. 1860, between 2½ p. m. and 4 p. m. of said day, at the office of John J. Eustis, a commissioner of deeds for the State of Arkansas, residing in the city of New Orleans, State of Louisiana, in pursuance of a commission hereto annexed, and to be read as evidence in a certain cause now pending in the circuit court of the county of Pulaski, in the State of Arkansas, wherein Eaton & Betterton are plaintiffs, and Charles G. Scott, Samuel L. Griffith, and John G. Bostick, executors of the estate of Phillip Pennywit, deceased, are defendants, on the part of the plaintiffs:

MOSES GREENWOOD, a witness known to me to be of lawful age, being to me at the time and place aforesaid produced, and being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth in regard to the matters in controversy in the suit afore-

said, did, then and there, on his oath aforesaid, depose as follows, to wit:

I have been a commission merchant in New Orleans for twenty-five years. I was the commission merchant of Phillip Pennywit, and of his house, Pennywit, Scott & Co., doing business at Van Buren, Arkansas, from 1848 to 1862. Capt. Pennywit was part owner of the Thirty-fifth Parallel. I received a letter from Capt. Pennywit, dated 26th August, 1861, *or on* about the 4th of September, 1861, enclosing power
51 of attorney from Capt. Pennywit to me, authorizing me to control his interest in the steamer Thirty-fifth Parallel, to sell or dispose of it, and to do anything that he could do himself for the advancement of his interest. The power of attorney was a full one for me to act for him. Under that power of attorney I employed Durant & Horner, who were lawyers of first standing and full practice, to represent Capt. Pennywit and the boat in a suit brought by Eaton & Betterton against Capt. Pennywit and others, wherein the boat was seized. I consider I had full power, under that power of attorney, to employ counsel. I advised Capt. Pennywit that Eaton & Betterton were pressing for the money due on the boat. If the boat was sold, as Capt. Pennywit had instructed me, I would have paid Eaton & Betterton, and my correspondence with Capt. Pennywit looked to that. I advised Capt. Pennywit, after the attachment had been levied and suit brought by Eaton & Betterton, by letter, written to his house 25th January, 1862, extract as follows: "The Parallel is still running to Memphis & Columbus; not doing much towards paying debts, but is not behind with current expenses. Major Eaton had an attachment issued. R. W. Adams and myself went on bond." Messrs. Durant and Horner have both removed from New Orleans. I wrote to Pennywit, Scott & Co. on the 4th Sept. 1861, of which the following is an extract: "Mr. Eaton is urging his claim very strongly;" referring to the claim against the boat Thirty-fifth Parallel. The following is another extract of the same letter. "Capt. Chapman arrived safe, and Capt. Pennywit's letter and power of attorney;" referring to the power of attorney previously mentioned by me. I again wrote to Capt. Pennywit on 24th December, 1861, of which
52 the following is an extract: "Chapman told me to sell his interest with yours, if I thought best, at the rate of $28,000 00 cash, as Eaton was pressing daily for his money; and, believing it a fair price, and your money, invested in a fair article of sugar at 3½ to 4 cents, would be as good or better than boating, I sold; but the time, as Captain C. said, had passed when the trade was to have been made. He declined to perfect the sale, and consequently your interest remains the same as before, and I may have to pay $500 00 for not being able to make my trade good. The power of attorney from Capt. Pennywit to me, before mentioned, was lost under the following circumstances: I had kept it locked up in my iron safe, when, in the spring of 1863, I was required by the Federal military authorities to leave New Orleans, being allowed to take out with me my personal clothing and ten days' subsistence only; my office was occupied by the United States Sanitary Commission. On my return in 1865, I found that my iron safe, wherein was deposited this power of attorney, had been removed and sold, and I have not been able to find the same to this day, although I have made diligent search for the same.

MOSES GREENWOOD.

Subscribed & sworn to before me this 1st of February, 1869.

A. SHELLING.
2d Justice Peace.

And at the same time and place, before me, also appeared JOHN EATON, and being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, in regard to the matters in controversy in the suit aforesaid, did, then and there, on his oath aforesaid, depose as follows, to wit: (Known to me to be of lawful age.)

53 The steamboat 35th Parallel, owned by Philip Pennywit, Chapman, and E. C. Carter, was indebted in solido in 1861, to Eaton and Betterton in the sum of six thousand seven hundred & ninety-five $\frac{31}{100}$ dollars, ($6,795 31,) the amount bearing interest at the rate of 8% per annum. Mr. Moses Greenwood exhibited to me the power of attorney from Pennywit to sign and act for him in everything relating to the steamboat 35th Parallel. The boat's business not being transacted to suit me, I was anxious for the payment of the claim, and informed Mr. Greenwood to that effect. Mr. Greenwood informed me that he had instructions to sell the boat and pay our claims out of the proceeds. If my recollection serves me, and I am very sure, an arrangement was made to sell the boat for the sum of $28,000. I think at that time she was making a trip to Memphis, and when she arrived here Capt. Chapman refused to complete the sale. I, then, for the firm, had the boat seized for the sum she owed us. She was released on bond for Pennywit and others, owners. Durant & Horner were the attorneys for the defendants. After the release of the boat on bond, which release was secured by Durant & Horner's appearing as attorneys for Pennywit and other defendants, the boat again resumed its trade for account of the same owners. This money was justly due to Eaton & Betterton, and for some time had been owing to them for stores—for cash to run the boat; and I think part was for paying notes given to the builders of the boat.

JOHN EATON.

Sworn to and subscribed before me this 1st February, 1869.

A. SHELLING,
2d Justice Peace.

54 STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans:

I, A. Shelling, an acting and duly commissioned justice of the peace in and for the city of New Orleans, parish of Orleans, State of Louisiana, do hereby certify and make known that the foregoing depositions of Moses Greenwood and John Eaton were taken before me on the 1st day of February, A. D. 1869, between the hours and at the place in the caption hereof above mentioned; that the examination, responses, and statements of each of said deponents were reduced to writing in my presence, and by the said deponents respectively sworn to and subscribed in my presence, at the time and place, and that said deponents are residents of the parish of New Orleans, State of Louisiana, and that the plaintiffs were represented by their attorneys, Mess. Clarke & Baine, and that the defendants were not represented either in person or by attorneys.

In testimony whereof I, A. Shelling, justice of the peace, do hereunto set my hand, at New Orleans, in the State of Louisiana, this first day of February, A. D. 1869.

A. SHELLING,
2d Justice Peace.

STATE OF LOUISIANA.
Parish of Orleans:

Fifth district court for the parish of New Orleans.

I, Louis Power, clerk of the above court of record, do hereby certify that A. Shell'ng, whose name appears to the above certificate, was
55 and is at the time of signing, a justice of the peace in and for the State and parish aforesaid, fully empowered to administer oaths, and that the above is the genuine signature of the said A. Shell'ng.

In faith whereof I hereto set my hand and affix the seal of said court this 4th day of Feb'y, A. D. 1869.

[L. S.] LOUIS POWER, *Clerk.*

To Charles G. Scott, John S. Bostick, and Samuel L. Griffith, executors of Philip Pennywit, dec'd, or Mess. Garland & Nash, your attorneys:

Take notice that, in pursuance of a rule of the circuit court of Pulaski County, and of a commission issued in conformity thereto, in a certain case there pending, wherein Eaton & Betterton are plaintiffs, and you, as such executors, are defendants, I shall proceed, on the first day of February, 1869, between the hours of 9 a. m. and 6 p. m. of said day, at the office of John G. Eustis, commissioner for the State of Arkansas, in the city of New Orleans, in the parish of Orleans, in the State of Louisiana, to take depositions of witnesses to be read as evidence on the trial of said cause when and where you may attend, if you think proper; and the taking of depositions under this notice, if not completed on said day, will be continued over from day to day thereafter, at the same place and between the same hours until concluded.

Given this 12th day of December, 1868.

EATON & BETTERTON, *Plaintiffs,*
56 By WATKINS & ROSE, *Att'y.*

(Endorsements on foregoing notice:)

We acknowledge due and legal service of this notice and reserve the privilege of taking depositions under the same notice on our part.

December 14th, 1868.

CHA'S G. SCOTT ET AL., *Def'ts,*
By GARLAND & NASH, *Att'ys.*

Witness: Moses Freeman, 23 Carondolet st., John Eaton, 11 Peter street or 36 Natches, on part of plaintiff.

Commission to take depositions.

STATE OF ARKANSAS,
Pulaski County:

In the Pulaski circuit court.

EATON & BETTERTON
v.
CHARLES G. SCOTT, SAMUEL L. GRIFFITH, JOHN S. Bostick, executors of the estate of Philip Pennywit, deceased. } Assumpsit.

The State of Arkansas to any judge or justice of the peace in the United States or Territories thereof, greeting:

Know ye that we, reposing confidence in your prudence and fidelity, do by these presents give unto you authority diligently to examine all

witnesses who may come before you in the above-mentioned suit
57 now pending in our circuit court in and for the county of Pulaski.

Therefore do we desire you at such times and places as shall be named to you for that purpose, you cause the said witnesses to come before you; that you then and there examine them upon their respective corporeal oathes first taken before you; that you reduce their examinations to writing; and when you shall so have taken them that you send the same with this commission, closed up under your seal, to us in our said circuit court at Little Rock, Arkansas, without delay.

In testimony whereof I have hereunto set my hand and affixed the seal of said court on this 15th day of December, 1868.

[SEAL.] GEO. W. McDIARMID, *Clk*,
By N. W. COX, *D. C.*

(Endorsements on foregoing:) No. 25. Circuit court Pulaski County. Eaton & Betterton vs. Cha's G. Scott et al., executors. Filed Feb'y 8th, & pub. in open c't, May 27th, 1869. Geo. W. McDiarmid, cl'k. Depositions of M. Greenwood & John Eaton, on the part of pl'ffs.

And here the plaintiffs closed their case.

And the defendants thereupon read the depositions of Moses Greenwood, A. J. Villere, Thomas J. Durant, and Charles W. Horner,
58 each, to prove the issues on their part, which depositions are as follows, viz:

To Messrs Eaton & Betterton, or Watkins & Rose, their attorneys:

Take notice that, in pursuance of a rule of the circuit court of Pulaski County, and of a commission issued in conformity thereto, in a certain case there pending, wherein said Eaton & Betterton are plaintiffs, and we, as executors of P. Pennywit, deceased, are defendants, we shall proceed, on the 9th day of March, 1869, between the hours of 9 a. m. and 5 p. m. of said day, at the law office of R. & H. Mann, No. 38 Union street, in the city of New Orleans, in the county of , State of Louisiana, to take depositions of witnesses, to be read as evidence on the trial of said cause, when and where you may attend, if you think proper; and the taking of depositions under this notice, if not completed on said , will be continued over from day to day thereafter, at the same place and between the same hours until concluded.

Given this 16th day of February, 1869.

C. G. SCOTT,
SAM'L GRIFFITH, &c.,
By GARLAND & NASH, *Att'ys.*

(Endorsement on foregoing notice:)

We acknowledge service of the within notice by copy and waive commission, reserving the right to examine witnesses, on our part, at the same time and place.

February 16th, 1869.

EATON & BETTERTON,
59 By WATKINS & ROSE, *Att'ys.*

STATE OF LOUISIANA:

Second district court for the parish of Orleans.

"*Extract from the minutes*" *of the second district court of New Orleans.*

MONDAY, *September 22nd*, 1862.

Present the Hon. J. S. Whitaker, judge.

The Honorable J. S. Whitaker, having been duly appointed judge of

this court, and having heretofore taken his oath of office, this day exhibited his commission from Brigadier G. F. Shepley, the military governor of the State of Louisiana, as such judge; and said commission was ordered to be recorded, and is in the following words, to wit:

UNITED STATES OF AMERICA,
State of Louisiana:

By George F. Shepley, military governor of Louisiana:

Know ye that, reposing special trust and confidence in the patriotism, integrity, and ability of J. S. Whitaker, by virtue of the authority vested in me, to exercise and perform within the limits of this State all and singular, the powers, duties, and functions pertaining to the office of military governor, including the power to establish all necessary offices and tribunals, I have appointed him judge of the second district court of New Orleans, and do authorize and empower him to exe-
60 cute and fulfill the duties of that office according to law, and to have and to hold the said office with all the powers, privileges, and emoluments to the same of right appertaining, from and after the date thereof.

In testimony whereof I have caused these letters to be made patent, and the seal of the State hereunto annexed.

Given under my hand at the executive department, in the city of New Orleans, this tenth day of September, in the year of our Lord one thousand eight hundred and sixty-two.

(Signed) G. F. SHEPLEY.

By the governor.
(Signed) JA'S E. DUNHAM,
Military Governor.

"*Extracts from the minutes.*"

TUESDAY, 15*th March*, 1864.

Present, Hon'ble J. S. Whitaker, judge.

WEDNESDAY, 16*th March*, 1864.

Present, Hon'ble J. S. Whitaker, judge.

THURSDAY, 17*th March*, 1864

Present, Hon'ble R. K. Howell, judge.

FRIDAY, 18*th March*, 1864.

Present, Hon'ble R. K. Howell, judge.

61 UNITED STATES OF AMERICA:

Second district court for the parish of Orleans.

I, M. O. Tracy, clerk of the second district court for the parish of Orleans, do hereby certify that the foregoing are true and correct extracts from the minute books of the late second district court of New Orleans, which books were by law of the legislature of this State, approved the 23rd July, 1868, transferred to this second district court for the parish of Orleans.

In testimony whereof I have hereunto set my hand and affixed the

seal of said court at the city of New Orleans on this ninth day of March, in the year of our Lord one thousand eight hundred and sixty-nine, and in the 93rd year of the independence of the United States of America.

[SEAL.] M. O. TRACY, *Clerk.*

I, Louis Duvigneaud, sole judge for the second district court for the parish of Orleans, do hereby certify that M. O. Tracy is clerk of said court; that the same is a court of record, having probate jurisdiction, and that the signature, M. O. Tracy, clerk, to the foregoing certificate, is in the proper handwriting of him, the said M. O. Tracy, clerk; to his official acts as such full faith and credit are due and owing; and I do further certify that his attestation is in due form of law.

62 Given under my hand at the city of New Orleans on this ninth day of March, in the year of our Lord one thousand eight hundred and sixty-nine.

L'S DUVIGNEAUD, *Judge.*

(Endorsement on foregoing.)

This paper is marked A, referred to in the deposition of A. J. Villiere hereto annexed.

J. G. EUSTIS, *Comm'r.*

A. J. VILLERE.

STATE OF LOUISIANA,
Parish of Orleans, city of New Orleans:

Depositions of witnesses taken and subscribed before me, John G. Eustis, a commissioner of deeds, &c., for the State of Arkansas, residing in the city of New Orleans, State of Louisiana, duly commissioned and qualified as such, on the 9th day of March, A. D. 1869, between the hours of 9 a. m. and 5 p. m. of said day, at the office of Messrs. R. & H. Marr, No. 38 Union street, in the city of New Orleans, parish of Orleans, State of Louisiana, in pursuance of a commission hereto annexed, to be read as evidence in a certain cause now pending in the circuit court of Pulaski County, in the State of Arkansas, wherein Eaton & Betterton are plaintiffs, and C. G. Scott, Samuel Griffith et al., executors of P. Penneywit, deceased, are defendants.

63 A. J. VILLERE, known to me to be of lawful age, being by me at the time and place aforesaid produced, and being by me duly sworn to testify the truth, the whole truth, and nothing but the truth in regard to the matters in controversy in the suit aforesaid, did then and there on his oath aforesaid depose as follows, to wit:

I have been deputy clerk of the second district of New Orleans since January, 1865, and have had the general management of the office. I was in New Orleans from 1862 to 1865. During that time I occasionally went to the custom-house. I know that Judge Whitaker presided as judge of second district court. I have examined the paper marked A. It is an exact copy of the entries in the minutes of the second district court of New Orleans of Monday, 22d of September, 1862; of March 15, 16, 17, & 18th, 1864. I have personal knowledge that Judge Whitaker acted as judge of the aforesaid court from September 22d, 1862, to the 16th of March, 1864; that R. K. Howell was his successor in office, and acted as such from 17th March, 1864, to 19th July, 1864. J. M. Thomas qualified as judge of said court on 21st of July, 1864, and acted as such from that date to July, 1868. The second district court for the parish of Orleans, created by the constitution of 1868, was organized with

Louis Duvigneaud as the judge thereof, on the 15th July, 1868, and that the said Louis Duvigneaud is still the judge of said court. That the second district court of New Orleans ceased to exist on the day of the organization of the 2nd district court for the parish of Orleans. That the books, papers, records of the late 2nd dist. court of New Orleans, were, by law of the legislature of this State, approved 23rd
64 of July, 1868, transferred to the second dist. court for the parish of Orleans, and are now in the custody of M. O. Tracy, clerk of said court. The signatures of M. O. Tracy, clerk, & L. Duvigneaud, judge, are genuine. I am personally acquainted with Judge Whitaker. I never knew him to be judge of the fourth district court of New Orleans.

Cross-examination:

I was not clerk during the whole time that elapsed from February, 1862, to January, 1865.

Direct ex:

Papers marked "A" introduced in evidence of counsel for defendants.

Direct ex:

The benches of the fourth and fifth district court of New Orleans were vacant from some time in June, 1862, to about July, 1864. I have heard that, by military order, the judges of the other courts of the city of New Orleans were to sit alternately as judges of the fourth & fifth district courts of New Orleans, and, under our system of laws, the judges of the district courts of New Orleans acted as judges of the court not presided over by them in cases of absence or sickness, or when the judge excused themselves, and in those cases no military order was required. I don't know how it would be in the case of the death of the judge, or vacancy in his office.

A. J. VILLERE.

Subscribed and sworn to before me on this 9th March, 1869.

JOHN G. EUSTIS,
Comm'r for Arkansas.

65 There not being time to complete the taking of the testimony under this commission on this day between the hours in the caption named, the further taking the same was adjourned until to-morrow at 2 o'clock p. m.

JOHN G. EUSTIS,
Comm'r for Arkansas.

STATE OF LOUISIANA,
City of New Orleans:

At 2 o'clock p. m., A. D. 1869, the commission was again opened, and the taking testimony resumed, in pursuance of the adjournment aforesaid.

And also appeared MOSES GREENWOOD, a witness known to me to be of lawful age, being to me at the time and place aforesaid produced, and being by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth, in regard to the matters in controversy in the suit aforesaid, did then and there, on his oath aforesaid, depose as follows, to wit:

I employed Durant & Horner, attorneys, in the case of Eaton and Betterton vs. P. Pennywit et al., in the 4th district court of New Orleans,

in which the steamboat 35th Parallel was attached. Mr. Pennywit was, at that time, living in Arkansas. I represented Pennywit in this matter, by power of attorney, on the 4th of September, 1861, and acknowledged receipt of it. That the power of attorney, together with other papers, were in my iron safe when the Federals took possession of the city of New Orleans in 1862, about 1st May. That I was required by the Federal authorities to leave the Federal lines in spring, 1863, not
66 being permitted to take anything except my personal clothing and ten days' subsistence. That subsequently the U. S. took possession of my office and occupied it till October, 1865. That, on my return, in September, 1865, *that* my iron safe, with many of my books and correspondence, were taken away, sold, or removed, and that I have never been able to find the same to this day, believing them to have been taken by some unknown persons. The power of attorney was executed at Van Buren, Arkansas. I was the commission merchant of P. Pennywit, who was engaged in commercial business at Van Buren. I think power of attorney was dated 26th August, 1861. My impression is it was written by Jesse Turner.

MOSES GREENWOOD.

Subscribed and sworn to before me, this 10th March, 1869.

JOHN G. EUSTIS,
Comm'r for Arkansas.

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans:

I, John G. Eustis, a commissioner of deeds, &c., duly commissioned and qualified for the State of Arkansas, residing in the city of New Orleans, State of Louisiana, do hereby certify and make known that the foregoing depositions of A. J. Villere and Moses Greenwood were taken before me on the 9th and 10th days of March, A. D. 1869, between the hours and at the place in the caption hereof above mentioned;
67 that the examination, responses, and statements of each of said deponents were reduced *in* writing by me, and in my presence, and by the said deponents respectively sworn to and subscribed in my presence, at the time and place aforesaid, and that said deponents are residents of the city of New Orleans, State of Louisiana, and that the plaintiffs in this suit were represented by Mess. Clark, Bayne, & Renshaw, attorneys, and the defendants by Mess. R. & H. Marr, attorneys.

Given under my hand and official seal at New Orleans, Louisiana, this tenth day of March, A. D. 1869.

[SEAL.] JOHN G. EUSTIS,
Comm'r for Arkansas.

(Endorsements on the foregoing deposition:) No. . Circuit court, Pulaski County. Eaton & Betterton vs. C. G. Scott et al., ex'rs. Received, filed, and published March 19th, 1869. Geo. W. McDiarmid, clerk.

In the Pulaski circuit court, State of Arkansas.

EATON & BETTERTON
v.
THE EXECUTORS OF P. PENNYWIT.

Be it remembered that, pursuant to the annexed stipulation of coun-

sel in the above-entitled cause, I did cause to be personally present before me, at Washington, D. C., this 12th April, 1869, THOMAS J. DURANT, esq., who, being duly sworn, answered the annexed interrogatories and cross-interrogatories as herein below written down.

68 R. D. MUSSEY,
U. S. Com'r for the District of Columbia, and Ex'r in Eq'ty Sup'r C't Dist. Col.

In answer to the first interrogatory he says: During the year 1862, and for many years before and after, I was practising law in New Orleans, in partnership *in partnership* with Charles W. Horner, who alone kept the books. At this distance of time I cannot recollect any such suit, except in a very faint and indistinct manner, not sufficient to enable me to say anything about it. The records of the court necessarily show whether I—that is to say, my firm—was engaged in such a suit; and our private books, which were accurately kept, will also show it. They are now in the possession of Messrs. Horner & Benedict, attorneys and counsellors at law, No. 18 Carondelet street, New Orleans, La.

In answer to the second interrogatory, he says: I cannot say.

In answer to the third interrogatory, he says: I cannot say.

In answer to the fourth interrogatory, he says: I cannot say.

In answer to the fifth interrogatory, he says: I cannot answer any more fully than I did to the first interrogatory.

69 Answer to the cross-interrogatories.

In answer to the first cross-interrogatory, he says: I cannot state.

In answer to the second cross-interrogatory, he says: I cannot state, except as above.

THOMAS J. DURANT.

Subscribed and sworn to this 12th day of April, A. D. 1869, before me, at Washington City, D. C.

R. D. MUSSEY,
U. S. Com'r & Ex'r in Eq'ty.

In the Pulaski circuit court, State of Arkansas.

EATON & BETTERTON
v.
EXECUTORS OF P. PENNYWIT.

Interrogatories to be proposed to Thomas J. Durant in the above-named cause.

1st. Did you ever act as attorney in behalf of Eaton & Betterton, in any cause against Philip Pennywit, in any court in New Orleans?

2nd. If yea, by whom were you employed? and state the time of employment.

3rd. Were you acquainted with Philip Pennywit?

4th. Did he ever employ you in person or by letter?

5th. State all you know of any such suit.

Cross-interrogatories.

1st. State particularly what connection, as attorney or otherwise, you

had with a suit pending in the 4th district court of New Orleans,
70 in 1862, wherein Eaton & Betterton were plaintiffs, and Levi Chapman, Edward C. Carter, William W. Ensign, and Philip Pennywit were defendants.

2nd. State whether you were not retained in that suit by Moses Greenwood, as attorney-in-fact of Pennywit, to represent Pennywit, and whether you did not appear as attorney for Pennywit in that suit, as well as for the other defendants.

WATKINS & ROSE,
For Plaintiffs.

We, the counsel for the parties in the foregoing cause, agree that the above interrogatories and cross-interrogatories may be answered, under oath, by Thomas J. Durant, before any proper officer, and his answers may be read on the trial of said cause, subject to exceptions for relevancy and competency.

GARLAND & NASH,
For Defendants.
WATKINS & ROSE,
For Plaintiffs.

(Endorsements on the foregoing deposition of Thomas J. Durant:) 25. Eaton & Betterton vs. Executors of P. Pennywit. Deposition of Thomas J. Durant for def't, taken and sealed up by me this 12th day of April, 1869. R. D. Mussey, U. S. com'r & ex'r in eq'ty. Washington, D. C., Apr. 12th, '69.

71 In the Pulaski circuit court, State of Arkansas.

EATON & BETTERTON
vs.
THE EXECUTORS OF P. PENNYWIT.

Interrogatories to be propounded to Charles W. Horner in the above-named case.

1st. Did you ever act as attorney in behalf of Eaton & Betterton in any case against Philip Pennywit, in any court in New Orleans; or of Pennywit?

2nd. If yea, by whom were you employed? and state the time you were employed.

3rd. Were you acquainted with Philip Pennywit?

4th. Did he ever employ you, in person or by letter?

5th. State all you know of any such suit.

Cross-interrogatories.

State particularly what connection you had, as attorney or otherwise, with a suit pending in the fourth dist. court of New Orleans in 1862, wherein Eaton & Betterton were plaintiffs, and Levi Chapman and Edward C. Carter, and William M. Ensign, and Philip Pennywit were defendants?

2nd. State whether you were not retained in that suit by Moses Greenwood, as attorney-in-fact of Pennywit, to represent Pennywit, and whether you did not appear as attorney for Pennywit in that suit as well as for other defendants?

We, the counsel for the parties in the foregoing suit, agree that Charles W. Horner may answer the above interrogatories under
72 oath, before any proper officer, and his answer may be read on the trial of said cause, subject to exceptions for relevancy & competency.

March 19, '69.

GARLAND & NASH,
For Def'ts.
WATKINS & ROSE,
For Pl'ffs

Depositions of witnesses, taken and subscribed before me, Theodore D. Rand, commissioner for the State of Arkansas, in the city and county of Philadelphia, in the State of Pennsylvania, duly commissioned and qualified as such, on the ninth day of April, A. D. 1869, between the hours of 9 o'clock a. m. and 6 o'clock p. m. of said day, at my office, No. 17 South Third street, in the city and county of Philadelphia, in the State of Pennsylvania, to be read as evidence in a certain cause now depending in the circuit court of the county of Pulaski, in the State of Arkansas, wherein Eaton & Betterton are plaintiffs, and Executors of Philip Pennywit are defendants on the part of the .

CHARLES W. HORNER, a witness known to me to be of lawful age, being at the time and place aforesaid produced before me, first duly affirmed to testify the truth, the whole truth, and nothing but the truth in regard to the matters in controversy in the suit aforesaid, did then and there, on his affirmation aforesaid, depose as follows, to wit:

73 In answer to the first interrogatory, he says: I cannot answer definitely. Eaton & Betterton were our clients, and I recollect on *on* one occasion that we had a suit against them in the fourth district court of New Orleans. I think it was a steamboat case, and that the steamboat had been sequestered by Eaton & Betterton, and bonded by the owners of the boat. The names of the owners or the securities on the bond I am unable to tell.

In answer to the second interrogatory, he says: We were employed on behalf of the sureties, and I think through the medium of Moses Greenwood. It was probably some twelve months, about, after the first of May, 1862, when the regular attorneys of record for the defendants in the steamboat suit were absent from the city.

In answer to the third interrogatory, he says: No.

In answer to the fourth interrogatory, he says: He never employed us.

In answer to the fifth interrogatory, he says: I can recall nothing of the suit but what I have already stated.

74 In answer to the first cross-interrogatory, he says: I have already stated, so far as I can recollect, my connection with the suit in the fourth district court.

In answer to the second cross-interrogatory, he says: My impression is, we were retained in that suit by Moses Greenwood, on behalf of the owners of the boat, and of the securities on the bond given to release the sequestration. It is some time since, & the recollection of the whole affair is vague in my mind.

CHARLES W. HORNER.

STATE OE PENNSYLVANIA,
City and County of Philadelphia, ss:

I, Theodore Rand, commissioner for Arkansas in and for the city of

Philadelphia, in the State of Pennsylvania, do hereby certify and make known that the foregoing deposition of Charles W. Horner was taken before me on the ninth day of April, A. D. 1869, between the hours and at the place in the caption heretofore mentioned; that the examination, responses, and statements of said affirmant was reduced to writing in my presence, and by the said affirmant affirmed to and subscribed in my presence, at the time & place aforesaid, and that said affirmant is a resident *is a resident* of the city & county of Philadelphia, in the State of Pennsylvania.

In testimony whereof I, Theodore D. Rand, commissioner, have hereunto set my hand and affix' my seal at the city aforesaid this ninth day of April, A. D. 1869.

THEO. D. RAND,
Commissioner for Arkansas, Philadelphia.

75 (Endorsements on foregoing:) Eaton & Betterton vs. Ex. Pennywit. Published and filed April 19th, 1869. Geo. W. McDiarmid, clerk.

And this was all the testimony offered and introduced in this cause.

And thereupon the plaintiffs asked the court to find as the law of this case the following propositions, three (3) in number; to the finding of any such propositions the defendants objected; but the court overruled such objection and found each and all of such propositions; and, to the findings of any and all of such propositions the defendants excepted, and there was time given them to prepare and tender their bill of exceptions in respect thereof; and said several propositions are as follows, to wit:

EATON & BETTERTON
v.
SCOTT ET AL. EX'RS OF PENNYWIT.

The plaintiffs ask the court to declare the law to be—

1st. That if Greenwood had a general power of attorney giving him authority to transact all business in Louisiana for Pennywit, and particularly any business concerning the 35th Parallel, Pennywit being a part owner of the same, and that Greenwood, as such agent, authorized a general appearance to be entered by attorney for Pennywit in the suit in Louisiana, which appearance was actually entered, then the judgment is as much binding on the defendants as if Pennywit had been personally served with process in Louisiana.

76 2nd. That if the power of attorney held by Greenwood was not sufficient to authorize him to employ attorneys for Pennywit in the suit in Louisiana, the same being continued to be a special and limited power, and he actually transcended his authority in such case, yet if said agent did actually employ such attorney in good faith, and informed his principal of his action in the premises in due course of business, and the said Pennywit did not at any time during his life, prior or subsequent to the rendering of the judgement, repudiate the action of his agent in the premises, he will be held to have ratified and confirmed said action, and the same is as binding on his executors as if full authority to do the act had been by him given previously.

3rd. That, though the jurisdiction of a court may, in some instances, be collaterally called in question, yet the authority of the judge of the court pronouncing the judgment in Louisiana cannot be questioned in this proceeding, it being sufficient if it appear that said judge was

de facto judge of said court, and that fact appearing of record cannot be denied by the defendants.

And thereupon the defendants asked the court to find the following propositions to be the law in this cause, twelve (12) in number; and to the finding of any and all of such propositions the plaintiffs objected, and the court sustained said objections and refused to find any or
77 either of such propositions; and the defendants at the time excepted, and time was given them to prepare and tender their bill of exceptions, and said twelve propositions of law as refused are as follows, viz:

1st. If the deceased Pennywit was a non-resident of the State of Louisiana, where said suit was brought in the 4th district of New Orleans, and continued so to be during the pendency of said suit until and after such judgment was rendered, and Pennywit was not served personally with notice of such suit, or he waived such service of notice, such judgment is not binding on him, and the findings must be for defendants.

2nd. If the evidence in the case shows the court in which such judgment was rendered had no jurisdiction of the person of said defendant, and he did not make his appearance to the suit in which said judgment was given, or do some act equivalent thereto, such judgment does not bind said defendants, and the findings must be for them.

3rd. The rule is to require personal service upon the party to be bound by a judgment and to dispense with this, his appearance to the suit, or any act waiving such service, must be clear and unequivocal, and when it appears that process has not been executed upon the defendant personally, there must be some substantive act by him to constitute him a party to the suit.

4th. That the appearing of Levi Chapman, one of the defendants sued in said 4th district court of New Orleans, and giving bond to dis-
78 solve the attachment, and the dissolving said attachment did not bind said Pennywit nor did it make him a party to said suit.

5th. If the evidence shows the suit in which such judgment sued on in this cause was a proceeding in rem against the steamboat 35th Parallel and the process issued therein was to enforce such a proceeding if said Pennywit, as one of the owners of said steamboat, was then a non-resident of the State of Louisiana, and had no personal notice of such suit, and did no substantive act to make himself a party thereto, then said judgment has no extra teritorial force, and binds, only so far as Pennywit is concerned, his interest in said boat.

6th. That even to make a good and valid construction notice of the pendancy of a suit, such as by publication, every requisite must be strictly complied with, and the record must show the same and leave nothing to be intended or inferred.

7th. If the transcript of the judgment sued on in this cause show that such judgment was had and recovered under proceedings instituted under the laws of Louisiana authorizing attachments against steamboats in the courts of said State, such judgment is of no force to bind deceased, and the findings must be for defendants.

8th. The testimony of Greenwood & Eaton, as to the power of attorney from Pennywit to Greenwood, is not sufficient to establish the
79 authority in Greenwood to employ counsel to defend in behalf of Pennywit in the suit against the 35th Parallel owners, or to execute a note for Pennywit.

9th The testimony of C. W. Horner, one of the attorneys who appear-

ed for Pennywit in said suit, shows he was employed by Eaton & Betterton, the plaintiff, and the appearance therefore of Durant & Horner for Pennywit does not bind him, and the findings must be for the defendants.

10th. The authority of those who appeared as attorneys for Pennywit being questioned, and Pennywit never being amenable to the process of the court that rendered the judgment, every presumption is in favor of Pennywit. The authority to bind him must be made out clearly and beyond doubt, and unless this is done, the findings must be for defendants.

11th. The jurisdiction of the court in New Orleans that rendered the judgment sued on, or its right to act in the premises may be inquired into this cause, and if it appears from the evidence that the judge who presided in said court and rendered the judgment aforesaid, then held his office by appointment of a military governor of the State of Louisiana, and under no other authority, such judgment was and is void.

12th. Upon the facts in this case the law is for the defendants.

80 And the court on the issues found for the plaintiffs; and to such finding the defendants excepted and tendered this their bill of exceptions in respect of the matters aforesaid, and moved the same be signed, sealed, and made of record in said cause, which is accordingly done.

W'M STORY, *Judge.* [SEAL.]

JULY 1ST, 1869.

(Endorsements on the foregoing bill of exceptions:) 25. Eaton & Betterton vs. Cha's G. Scott & al., ex'rs of Pennywit, deceased. Defendants' bill of exceptions. Filed July 1st, 1869. Geo. W. McDiarmid, cl'k.

STATE OF ARKANSAS,
County of Pulaski, ss:

I, George W. McDiarmid county clerk, and ex-officio clerk of the circuit court for the county aforesaid, do hereby certify that the annexed and foregoing eighty-eight (88) pages are a true and correct transcript of the records and papers in the cause therein mentioned, the same as are filed in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court on this 13th day of August, A. D. 1869.

[L. S.] GEO. W. McDIARMID, *Clk,*
By N. W. COX, *D. C.*

81 And afterwards, to wit, at the December term, A. D. 1869, of the supreme court of the State of Arkansas, to wit, on the 13th day of December, A. D. 1869, the following proceedings were had, to wit:

CHARLES G. SCOTT ET AL., EX'RS OF PHILIP Pennywit, dec'd, appellants,
v.
EATON, BETTERTON & CO., APPELLEES.
} 62. Appeal from Pulaski circuit court.

Come the parties, by their respective attorneys, and this cause is submitted upon briefs, and by the court taken under advisement.

And afterwards, at the December term, A. D. 1870, of the court afore-

said, to wit, on the 12th day of December, 1870, the following proceeding was had in this cause, to wit:

CHARLES G. SCOTT ET AL., EXR'S OF PHILIP Pennywit, deceased, appellants, *v.* EATON, BETTERTON & Co., appellees. } Appeal from Pulaski circuit court.

This cause came on to be heard upon the transcript of the record of the circuit court of Pulaski County, and was argued by counsel; on consideration whereof, it is the opinion of the court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is therefore considered by the court that the judgment of said
82 circuit court in this cause rendered be, and the same is hereby, in all things affirmed, with ten per cent. damages upon the amount of said judgment and with costs.

It is further considered that said appellees recover of said appellants all their costs in this court in this cause expended, and have execution thereof.

83 STATE OF ARKANSAS, *set:*

I, N. W. Cox, clerk of the supreme court of the State of Arkansas, hereby certify that the annexed and foregoing seventy-five pages of manuscript contain a full and true transcript of the record and proceedings in the case of Charles G. Scott, et al., executors of Philip Pennywit, deceased, vs. Eaton, Betterton & Co., in said supreme court, as the same is now on file and of record in my office.

In testimony whereof I have hereunto set my hand and the seal of said court at Little Rock, this 12th day of January, A. D. 1871.

[SEAL.] N. W. COX, *Clerk.*

Clerk's fees: This transcript $30 70; fees in sup't c't, 16 45.

(Indorsement on cover:) No. 505. Charles G. Scott, John S. Bostick, and Samuel L. Griffith, as executors of Philip Pennywit, dec'd, plaintiffs in error, vs. John Eaton and William H. Betterton, late partners as Eaton & Betterton. Arkansas sup. court. Filed 14th February, 1871.

Supreme Court of the United States.

DECEMBER TERM, 1871.

CHARLES G. SCOTT *et al.*, Plaintiffs,
v.
JOHN EATON *et al.*, Defendants.
No. 283.

ERROR TO THE SUPREME COURT OF ARKANSAS.

BRIEF FOR PLAINTIFFS IN ERROR.

As indicated in the brief filed for plaintiffs in error on the motion to dismiss this case for the want of jurisdiction, the case originated upon a supposed judgment, rendered in what was *called* the State of Louisiana, by attaching a steamboat navigating the waters of the river Mississippi.

It was not, as the record shows, an attachment against the right, title, and interest, or the property of Pennywit in the steamboat; but it was a direct proceeding in *rem* against the boat, and plaintiffs assert most confidently this could not then nor cannot now be done. There is no semblance of jurisdiction in the court that issued this process. Even if the court, by common law or otherwise, had jurisdiction of the contract and of the parties, it could not by its process thus seize upon the boat. (*The Moses Taylor*, 4 *Wall.*, 411; *The Hine* v. *Trevor*, *Ib.*, 555; *Jackson* v. *The Kinnie*, 17 *Am. L. R.*, 470; *The Belfast*, 7 *Wall.*, 624.)

There is peculiar force in this objection coming from Pennywit, who, it is shown by the record, was not a citizen of

Louisiana; was not in that State when process in this suit could have been served on him; was not served with process, and never empowered any one to appear for him in the suit. All these things Pennywit pleads, in addition to the plea of *nul tiel record*, and it was legitimate for him to plead them. (*Arnott* v. *Webb*, *Dillon C. C.*, 362.) The court below ruled against these views by denying the 7th instruction asked by appellants, (*Trans.*, p. 36,) and for this error the case should be reversed.

It is further shown by the record, that the judge who presided in the court that pretended to render judgment was appointed by and under the military authority then holding the territory of Louisiana, and his commission was issued by that authority. (*Trans.*, pp. 27, 28.) Neither the military commander nor the military governor of Louisiana had any such power, and the appointment in this case was a nullity. If, as this court has decided, (*Texas* v. *White*, 7 *Wall.*, 700,) the seceding States were still States of the Union, then it is as true, no military appointments of judges for Louisiana, one of those seceding States, can be upheld. If it be held, however, that Louisiana, being then in war against the General Government, and the forces of the latter had possession of her territory, a government there by those forces was a necessity, that may be admitted, so far as the necessities of military occupation were concerned, and no further. (*Handlin* v. *Wickliffe*, 12 *Wall.*, 173.) When this court said, (in *The Grapeshot*, 9 *Wall.*, 129,) that a court organized by the President of the United States in Louisiana, during the occupation by the federal troops, was a lawful court, it did not state or intimate that any military commander or governor there could organize a court and appoint judges. So, when it was held that Mr. Lincoln could appoint Judge Peabody to hold courts in that territory, and his judgments under such appointment would be valid, (*United States* v. *Reiter*, *Am. L. Reg.*, (July, 1865,) p. 534,) it was not pretended that the military commander or governor there could do this. How does the President

get this authority? Obviously as Commander-in-Chief of the army, under the Constitution of the United States. When it is given to him as such, it is given to no one else; in fact, the very granting it to him denies it to all others. It is not shown that Mr. Lincoln attempted to delegate this authority to his subordinates in Louisiana; and if he had done this, it would not have helped the matter in the least. Of the very essence of our Government is, neither department can delegate its powers and authority. Any other rule, as all our books show, would destroy the responsibility of each department. And if ever the principle, *a delegated authority cannot be re-delegated*, had application and value, it certainly has in matters like this. If the military subordinates in Louisiana could appoint this judge, they could have appointed a postmaster, a United States judge, and all the officers necessary to be appointed by the President, and by the President and the Senate too; and if Mr. Lincoln could have empowered them to make this appointment, he could have authorized them to appoint all the others, and the President to-day can have all the officers appointed by agents all over the country. Had the judge here held his appointment by or from Mr. Lincoln direct, the question would have been quite different; but he did not.

In the matter of the celebrated *Kearney code*, it would seem this power was recognized in the commander. (20 *How.* 176.) But that was in the case of a foreign war and of a conquest; but the war between the States was, in no sense a foreign war, nor was it a war of conquest. (9 *Wall.*, *supra.*) And again, this court held expressly that, even as to the *Kearney code*, the exercise of this power could be had only during the military occupation. (20 *How.*, 178.)

It is idle then to claim that Judge Whitaker, under his appointment, was competent to hold this court and to render a judgment against a non-resident, and in admiralty, as he did here. Indeed, these appointments at last, or in any shape, are intended simply to provide tribunals to preserve peace and to dispense justice among and to the people immediately subject to the occupation of the military or within

its boundaries. This is all; and all the cases upon this subject so say, or plainly so intimate.

In this inquiry it was premissible, by way of testing the validity of this judgment, to look into the organization of the court that was said to have rendered it. This question is always open. (1 *Parson Shipping and Admiralty*, 77, *note* 2; *Snell* v. *Faussatt*, 1 *Wash. C. C.*, 271; *Wheaton International Law*, (by Dana,) § 148, *notes; Story Confl. Laws*, (by Redfield,) §§ 585–611.) As quite applicable to this case, and as well worth considering at all times, let us read what *Judge Washington* said in *Snell* v. *Faussatt*, *supra*: "*When we hear of a court being constituted by a military commander, and particularly where it is not clear that he was at the time* COMMANDER-IN-CHIEF, *it destroys the presumption of its legality, so as to require the party who would support the condemnation to show that the court was instituted by lawful authority.*" In this case even the presumption is destroyed, for it is shown the appointment was made by a subordinate of the Commander-in-Chief.

Upon page 15 *Transcript* is what purports to be the judgment rendered in Louisiana; but it is for no certain sum, and is still open, by its own language, for further litigation on the part of the defendants in that suit. This supposed judgment does not ascertain the amount due, and does not make of itself a final judgment in the case, and therefore is not such a judgment as will support either an execution or an action in a sister State under any act of Congress. (1 *Tidd Pr.*, 651; 16 *How.*, 65; 2 *Cr. C. C.*, 37; 5 *Bl. C. C.*, 5.)

In view of all this, it is plain beyond dispute, there is no such a record presented in this court as warrants any *faith and credit* to be given to it, either under the Constitution, the different acts of Congress on this subject, or any of the adjudicated cases as yet reported. It is not a judgment from any State court, nor of any Territorial court: in fact, it is no judgment at all; it is but the enunciation of a local judge, appointed by military authority, as his commission

in the record shows, and is entitled to no recognition in any of the tribunals of the States. It comes within none of the definitions yet given to a record of a court in this country, (1 *Greenleaf Ev.*, 505; 1 *Brightly's Digest of U. S. Laws*, *p.* 9, *et seq.*, *notes a and b; Ib.*, 265, § 9, *and notes*,) and it would be sad, beyond expression, for it to receive countenance in this court.

A. H. GARLAND,
For Plaintiffs.

Supreme Court of the United States

(NO. 283.)

CHARLES G. SCOTT, *et al Ex'rs, Plaintiffs in Error,*
vs.
EATON & BETTERTON, *Defendants.*

Error to the Supreme Court of Arkansas.

Two questions are presented by the record for the consideration of this Court, (*Tr. p.* 1.):

1. "The jurisdiction of State Courts to attach steamboats navigating the rivers and waters of the United States."

The proceeding in Louisiana, which resulted in the judgment on which this suit was brought, was not against a steamboat *in rem.*, but was a suit against Chapman, Carter, Ensign and Pennywit, personally, and the steamboat was attached as their property, (*Tr.* 10, 11, 12.) The case comes within the rule of *Hine v. Trevor*, 4 *Wal.*, 555.

2. "The validity of a judgment rendered in a civil suit between individuals, by a Judge of a State court, appointed and holding his commission under a military Governor of said State, holding his position by appointment of the President of the United States."

If we admit that that question may arise on the record, it seems to be disposed of in *Handlin v. Wickliffe*, 12 *Wal.*, 173. Besides, the authority of the judge presiding in Louisiana cannot be collaterally questioned. *State v. Williams*, 5 *Wis.*, 308; *Brown v. Lunt*, 37 *Me.*, 423; *Burton v. Patton*, 2 *Jones*, (*N. C.*) 124; *Smith v. State*, 19 *Conn.*, 493; *Aulanier v. Governor*, 1 *Texas*, 653; *Hoagland v. Culvert*, 1 *Spencer*, (*N. J.*), 387; *Farmer's Bank v. Chester*, 6 *Humph.*, 458; *Schlenker v. Risley*, 3 *Scam.*, 483; *Vance v. Schuyler*, 1 *Gilman*, 160; *Currier v. Boston R. R.*, 11 *Foster*, 209; *People v. Collins*, 7 *Johns.*, 549: *Com. v. Slifer*, 25 *Penn. S. R.*, 23; *Ludlow v. Ramsey*, 11 *Wal.*, 581; *Cooper v. Reynolds*, 10 *Id.*, 308; *Stovall v. Banks*, *Id.* 583; *Hampton v. McConnell*, 3 *Wheat.*, 234; *Caldwell v. Carrington*, 9 *Pet.*, 86; *Cheever v. Wilson*, 9 *Wal.*, 108.

Respectfully,

U. M. ROSE,

For Defendants in Error.

Zell -- Mandamus order of—
15-384 Order Dany
Jany 31 Submitted

SUPREME COURT OF THE UNITED STATES.

No. 7.—ORIGINAL.

EX PARTE: IN THE MATTER OF MARSHALL O. ROBERTS ET AL., PETITIONERS.

RETURN TO RULE.

FILED JANUARY 10, 1873.

Dec D. 1872

1 EX PARTE: IN THE MATTER OF MARshall O. Roberts et al., petitioners.

In answer to the rule of the Supreme Court of the United States in the above matter, made on the 20th day of December, 1872, requiring the Court of Claims to show cause, on Friday, the 10th day of January, 1873, why a writ of mandamus should not issue from said Supreme Court, directing the judges of the said Court of Claims to hear, entertain, and decide the motion for a new trial filed by the claimants in a certain cause therein depending, wherein Marshall O. Roberts, Horace F. Clark, and Edward N. Dickerson, trustees, are plaintiffs, and The United States are defendants; and also to hear, entertain, and decide the motion filed November 23, 1872, by the plaintiffs in said cause to correct the records of said Court of Claims, the undersigned, the chief justice and a part of the judges of said Court of Claims,—being together a majority of the members of said court,—respectfully submit to the honorable the Supreme Court of the United States the following answer to said rule:

2 The said suit of Marshall O. Roberts et al., against The United States, was instituted on the 2d day of March, 1866, by a petition signed by Owen & Wilson as attorneys for claimants; and from that time to the present, Thomas Wilson, esq., one of the firm of Owen & Wilson, has acted in said suit as attorney of record for the claimants.

Sometime after the institution of said suit, R. M. Corwine, esq., a member of the bar of this court, appeared in said suit as counsel for claimants. On the 11th day of October, 1869, he filed in the case a printed argument for claimants, signed by him as "of counsel;" and from that time forward he has continued to act in said case, both as attorney and as counsel for the claimants, by appearing in open court as such, and by signing papers in the cause as such.

On the 27th day of February, 1871, the judgment of the court was rendered and entered of record, dismissing the claimants' petition.

On the 16th of May, 1871, a motion for a new trial was filed on behalf of claimants, which was signed by the said Wilson and the said Corwine, as attorneys for claimants, as set forth in connection with the petition herein for a writ of mandamus.

3 On the 22d day of said month of May, the application for an appeal was filed on behalf of the claimants, by said Wilson as their attorney, with the stipulation of counsel annexed; which papers are set forth in terms in connection with the petition of the claimants to the Supreme Court for a writ of mandamus.

On the same day the said motion for a new trial was, by consent of parties, continued to the next term of the court, to be held on the first Monday of the ensuing December. On the 2d day of May, 1872, the said Corwine appeared in open court, & moved the court to grant the appeal prayed for in the application filed as aforesaid by the said Wilson, on the 22d of May, 1871; and it was ordered by the court that the appeal be allowed.

On the next day of the sitting of the court, to wit, May 6, 1872, the said Corwine appeared in open court, & filed a motion to revoke the order allowing said appeal; which motion the court allowed.

On the 22d day of November, 1872, the claimants called up their aforesaid motion for a new trial for argument; but the court refused to entertain said motion for the reasons set forth in the following order

4 entered of record that day:

"The motion for a new trial filed by the claimants in this case, on the 16th day of May, 1871, coming on to be heard, it is ordered, that

the said motion be not entertained by the court, because, on the 2d day of May, 1872, an appeal was, on the motion of claimants, allowed in this case to the Supreme Court of the United States; which allowance of appeal, it is considered by the court, was not set aside by the order to that intent made on the 6th of May, 1872; which order was made without jurisdiction in this court, after the allowance of the appeal."

On the 23d day of November, 1872, the claimants filed in court their motion for the correction of the record in the case, as the same and the accompanying affidavits are set forth by the claimants in connection with their application for a writ of mandamus. This motion the court refused to entertain, for the reason stated in the following order entered of record that day:

"The claimants, by their attorney, file a motion to the court to correct its journal record by revoking and striking out the order of allowance of appeal in this case made and entered on the 2d day of May, 1872, and submit affidavits in support of said motion; whereupon the court refuses to entertain the said motion, because it considers that, since the allowance of appeal so made and entered, it has no jurisdiction thereof."

Having thus stated all the facts in the case which appear to be essential to the proper determination of this matter, the undersigned set forth and show as causes why a writ of mandamus should not issue herein, the following:

First. The order of the court allowing the appeal prayed for by the claimants, through their attorney, Thomas Wilson, was lawfully and rightfully made when moved for by said Corwine.

Second. After that order was made, the case was no longer within the jurisdiction of the Court of Claims, but within that of the Supreme Court of the United States.

The facts stated herein, and the positions of law herein taken, are all the cause which the undersigned have to show why a writ of mandamus should not be issued as prayed by the petitioners.

C. D. DRAKE.
EDW'D LORING.
SAM. MILLIGAN.

O

Supreme Court of the United States.

DECEMBER TERM, A. D. 1872.

MOTION FOR MANDAMUS.

Now comes Thomas Wilson, an attorney and counsellor of this Court, and for the reasons and causes stated in the affidavits hereto attached, moves the Court here for an alternative writ of mandamus directed to the Court of Claims, commanding the said Court to proceed to hear, entertain and decide the motion for new trial filed by the plaintiffs in a certain cause therein depending, wherein Marshall O. Roberts, Horace F. Clark, and Edward N. Dickerson, trustees, are plaintiffs, and the United States are defendants, No. 2,221; and also, to proceed to hear, entertain, and decide the motion filed November 23d, 1872, by the plaintiffs in said cause, to correct the records of said Court in the same cause, both of which said motions, and the refusal of the Court to entertain or decide the same, will further appear by reference to the records of said Court in said cause, a transcript of which is herewith filed and made part of the record herein, or in default thereof that the said Court show cause to the contrary at a time to be named by this Court.

THOMAS WILSON,
Attorney for M. O. Roberts et als.

To the Attorney General of the United States:

Please take notice that the above motion and accompanying papers will be filed in the clerk's office of the Supreme Court of the United States, and will be called for hearing

before said Court on Friday, the 6th day of December, proximo, or as soon thereafter as counsel can be heard.

THOMAS WILSON,
Attorney for M. O. Roberts et als.

Service of the above notice accepted this 26th day of November, A. D. 1872.

WILLIAM MCMICHAEL,
Assistant Attorney General.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

I, Edward N. Dickerson, being duly sworn, do depose and say:

That I am one of the plaintiffs in the suit now pending in the Court of Claims under the title of Marshal O. Roberts *et als. vs.* The United States, numbered in that court 2,221; that the plaintiffs employed Thomas Wilson, Esq., as their attorney, to prepare and file the petition in said court, and to prosecute their said suit; that Mr. Wilson prepared the petition; it was signed and sworn to by one of the plaintiffs as required by the rules of said court, and signed also by said Wilson and his partner Owen, under the firm name of Owen & Wilson, as attorneys of record; that Owen had never anything further to do with the case, and several years ago went out of all practice, and left the city of Washington.

That after taking of testimony the said cause was submitted to the court, and after due consultation, a judgment was, on the 27th day of February, 1871, rendered in favor of defendants; that on the 16th day of May thereafter a motion for new trial was filed; that on the 22d day of May the said motion for new trial coming on for hearing before said court, and the assistant attorney general being then unwilling to proceed with the argument, and the plaintiffs, fearful of losing their right of appeal, by extending the time of the determination of the motion for new trial (in case it should be decided adversely to them) beyond the 90 days from the rendition of

the judgment, it was agreed between them and the assistant attorney general that they should make their motion for new trial, as the same appears in the record herewith presented, and he would agree to and make the stipulation thereto attached and written thereunder, and under this stipulation and by virtue thereof the motion for appeal was left pending and undetermined until the final determination of the motion for a new trial.

That on the 2d day of May, 1872, R. M. Corwine, Esq., who had been theretofore employed as counsel to assist in the argument of the cause, but who was not and never had been attorney of record in the cause, and without the knowledge or authority of either the parties themselves or of their attorney of record, moved the court for an order allowing the appeal upon the motion theretofore filed May 22, 1871, by Mr. Wilson; which order, upon his request and motion, was by the court accordingly made on the 2d of May, 1872.

That the said Corwine, discovering his error therein, on the 6th day of May. 1872, and at the next day's session of the court, appeared in court and moved and requested the court to vacate and set aside the order of allowance of appeal made on his motion May 2d, which order was accordingly made by the court, and the former order of May 2d set aside and revoked, all of which was done before any copy or transcript of the record of said cause, or any part thereof, had been either made out by the clerk or filed in the office of the clerk of the Supreme Court, and while the case and the record thereof was still in the Court of Claims and nothing done towards perfecting the appeal.

The motion for new trial was still held and continued upon the docket of the Court of Claims under the provisions of the stipulation aforesaid and subject to the arrangements of counsel, and came up for hearing and argument on November 22d, instant.

That upon the calling of said motion on that day, the court, on its own motion, refused and declined to hear or

decide said motion, on the ground specified in its order of that date, to wit, that since the allowance of the appeal by the order of May 2, 1872, the court had no jurisdiction thereof.

That upon the 23d day of November, 1872, the plaintiffs made a motion, supported by affidavits, to correct the record by the revoking and setting aside of the order of allowance of appeal of May 2, 1872, as having been asked and granted without the authority of the parties or of their attorney of record, the which motion to correct record the court declined and refused to hear or decide on the same ground, *i. e.* want of jurisdiction; all which will appear by reference to the said record, a transcript of which, certified to, &c., is herewith presented and filed.

This deponent further declares and says, that this suit is brought by Marshall O. Roberts, Horace F. Clark, and himself, in their fiduciary capacity as trustees, under an express trust, for the use and benefit of their *cestuis que trust*, and that this deponent has no pecuniary interest whatever in the event of this suit, and is only desirous of protecting the interests that have been confided to him as a trustee.

Wherefore, and by reason of the premises, the plaintiffs have no remedy except by the aid of the Supreme Court of the United States, acting through and by means of its writ of mandamus directed to the said Court of Claims, commanding and requiring the said Court to proceed without delay to the consideration and decision of the said motions.

EDW'D N. DICKERSON.

Sworn and subscribed this 23d of November, A. D. 1872, before me.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

I, Thomas Wilson, being duly sworn on oath, do say, that

I am the sole attorney of record in the cause entitled Marshall O. Roberts *et. als. vs.* The United States, in the Court of Claims; that on the 16th day of May, 1871, I presented the motion for new trial set forth in the transcript of record to Judge Peck, one of the judges of said court, who is, by the rules of the court or arrangement among the judges, charged with the duty of examining and allowing motions as of course, who referred the same, as appears by his endorsement thereon, to the "law docket" for hearing before the full bench.

That I, at the same time, presented to him the motion to vacate the judgment rendered in said cause as set forth in the transcript of record, whereupon he made the same endorsement and reference to the "law docket" as on the motion for new trial aforesaid.

That on the 22d day of May thereafter, the said motions being called for argument before the full bench, and the assistant Attorney General craving and being allowed further time and the court being about to adjourn for the summer or the term, I contended, on behalf of the plaintiffs, that a postponement of the hearing and decision of my motion for new trial beyond ninety days from the rendition of the judgment might lose to us our right of appeal, which we were desirous to preserve, and that the motion for appeal might lose to us our right to move for new trial, or might be considered an abandonment thereof, when it was agreed in open court, upon the suggestion of the court and the assistant Attorney General, that the motion for appeal, as shown in the transcript, might be made and filed and that the stipulation attached thereto, signed by the parties, or their respective attorneys, would save to the plaintiffs their desired right of appeal and also of new trial; whereupon, that being done, and the rights of appeal and of new trial both supposed to have been saved to the plaintiffs, the court of its own accord passed the motion to vacate judgment aforesaid, and declined to make any order

thereon, considering that the same object had been attained through and by the stipulation then made.

THOMAS WILSON.

Subscribed and sworn to before me, this 29th day of November, 1872.

SAMUEL H. HUNTINGTON,
Chief Clerk Court of Claims.

TRANSCRIPT OF RECORD.

At a Court of Claims held at the Capitol, in the city of Washington, February 27, 1871.

Marshall O. Roberts *et al. vs.* The United States, No. 2,221.

Chief Justice Drake delivered the opinion of the court in this case, and judgment was ordered to be entered as follows:

On due consideration of the premises, the court finds for the defendant, and do order, adjudge, and decree that the claimants take nothing by their petition, and that the same be dismissed.

By the court.

Judges Loring and Nott dissented, and gave their reasons therefore in separate opinions.

At a Court of Claims held at the Capitol, in the city of Washington, May 16, 1871.

Marshal O. Roberts *et al. vs.* The United States. 2,221.

Mr. Wilson and Mr. Corwine filed a motion for a new trial in this case, as follows:

In Court of Claims.—December Term, 1871.

Marshall O. Roberts *et als. vs.* The United States, No. 2,221.

Motion for new trial.

(Indorsed:) "Referred to law docket." "E. Peck, judge." Filed May 16, 1871.

Come now the plaintiffs and move the court for a new trial in the above-entitled cause, and for reasons set forth the following:

First. That the finding of fact in paragraphs 10 and 11, and

the conclusion of law in paragraphs 2, 3, and 4, as found by the court, are erroneous, in so far as they state and find that the extra service for which this suit was brought was performed by the United States Mail Steamship Company, and *not* by these plaintiffs, and in so far as it states and finds that the pay due for such extra service, if any, was due to the United States Mail Steamship Company, and *not* to these plaintiffs.

Second. That the agreement or contract to carry these extra mails was, in truth and in fact, made by the trustees, and not by the United States Mail Steamship Company, and that the ships which performed this extra service were, in truth and in fact, the ships of the trustees, and not of the United States Mail Steamship Company.

Third. That, by whomsoever the contract to carry was made, and by whomsoever it was performed, whether by these plaintiffs, as trustees, or as representing the United States Mail Steamship Company, it was fairly and definitely agreed, by and between all the parties interested, that the proceeds and avails of this, as well as all other services, by whomsoever performed or collected, should be in trust for all, and should go into the hands of the trustees, and be by them divided according to the various deeds of trust.

And, in support of said motion, the plaintiffs introduce the following evidence, hereto attached and made part of this motion:

* * * * * * * *

* * * * * * * *

THOMAS WILSON,
R. M. CORWINE,
Attys. for Plaintiffs.

In the same case Mr. Wilson filed a motion to vacate the judgment heretofore rendered in the case, and to enter a new judgment, that an appeal may be taken therefrom to the Supreme Court of the United States, as follows:

"In Court of Claims.—December Term, 1871.

"Marshall O. Roberts *et al. vs.* The United States.

Motion to vacate judgment.

"Come now the plaintiffs in the above-entitled cause and move the court to set aside and vacate the judgment heretofore rendered in said cause, for the purpose and with intent to enter a new judgment in case the motion for new trial be overruled, to enable the parties to prosecute their appeal to the Supreme Court within the ninety days thereafter, as required by the rules of the Supreme Court."

THOMAS WILSON,
Attorney for Plaintiffs.

Endorsed: "Filed May 16, 1871. Referred to Law Docket 16th May, 1871."

"E. PECK, *Judge.*"

At a Court of Claims held at the Capitol, in the city of Washington, May 22d, 1871.

Marshall O. Roberts *et al. vs.* The United States. 2221.

In this case Mr. Wilson filed an application for the allowance of an appeal from the judgment rendered by the Court of Claims on the 27th day of February, 1871, to the Supreme Court of the United States, as follows:

"In the Court of Claims.—December Term, 1870.

"M. O. Roberts *et al. vs.* The UnitedStates. 2221.

Motion for appeal.

"Now comes the plaintiffs in the above-entitled cause and move the court to grant an appeal in said cause to the Supreme Court of the United States."

"THOMAS WILSON,"
Attorney for Plaintiffs.

"EDW'D N. DICKERSON."

"It is agreed and stipulated that the above motion shall not in any way affect to its detriment the motion heretofore filed for the granting of a new trial, or in any way prevent a hearing and decision of said motion upon the merits thereof."

"THOMAS WILSON,
Attorney for Plaintiffs.
"THOMAS H. TALBOT,
Ass't Attorney General.
"EDW'D N. DICKERSON,
For self and Trustees.

At the same time, and in the same case, it was *Ordered,* That the motion for a new trial, filed on the 16th day of May, 1871, be continued to the next term.

At a Court of Claims held at the Capitol, in the city of Washington, on the 2d day of May, 1872.

Marshal O. Roberts *et al. vs.* The United States.—2,221.

The claimants, by their attorney, move the court to grant them an appeal to the Supreme Court of the United States, as prayed for in their motion filed on the 22d day of May, 1871.

Ordered, That the appeal be allowed as prayed for.

At a Court of Claims held at the Capitol, on the 6th day of May, 1872.

Marshal O. Roberts *et al. vs.* The United States.—2,221.

Mr. Corwine filed a motion to revoke the order of the court allowing an appeal in this case without prejudice to the claimants to renew said motion hereafter.

Allowed.

At a Court of Claims held at the Capitol, at Washington, D. C., on the 22d day of November, 1872.

Marshal O. Roberts *et al. vs.* The United States.—2,221.

The motion for a new trial filed by the claimants in this

case on the 16th day of May, 1871, coming on to be heard, it is—

Ordered, That the said motion be not entertained by the court, because on the 2d day of May, 1872, an appeal was, on the motion of claimants, allowed in this case to the Supreme Court of the United States; which allowance of appeal, it is considered by the court, was not set aside by the order to that intent made on the 6th of May, 1872; which order was made without jurisdiction in this court after the allowance of the appeal.

"In the Court of Claims.—December Term, A. D. 1872.

MARSHALL O. ROBERTS *et als.*
vs.
UNITED STATES. } No. 2,221.

MOTION TO CORRECT RECORD.

[Endorsed. Filed November 23d, 1872.]

"Now comes the plaintiffs and move the Court to correct its journal record by revoking and striking out the order of allowance of appeal, made in and by the Court, and entered on its journal of proceedings on the second day of May, 1872, for the following reasons:

"1. That the entry of allowance of appeal was an error and mistake, and should never have been made, being done without proper authority.

"2. That it was not asked for or prayed by the attorney of record in the case.

"3. That it was asked and granted without any authority from the attorney of record in the case, or from the parties themselves.

"4. For the reasons given in the annexed affidavits."

"THOMAS WILSON,"
Attorney for plaintiffs.

"I, Thomas Wilson, being duly sworn, on oath do say and declare that I am the sole and only attorney of record in the case in the Court of Claims, under the title of Marshall O. Roberts *et als. vs.* The United States, numbered 2,221.

That I wrote and filed the petition therein, was the original attorney of record, and have never been superseded or discharged. Although the names of Owen and Wilson appear as signed to the petition as such original attorneys of record, yet Colonel Owen never appeared in Court, and I had sole and uncontrolled management of all cases of the firm in Court. Colonel Owen removed from this city several years ago, gave up his practice here as an attorney and claim agent, and I succeeded him, and have carried on the firm business remaining since his departure.

That R. M. Corwine, Esq., as I am informed and believe, several years after the commencement of the suit, was employed as counsel in the cause, and as such has taken action therein, but has not at any time been attorney of record.

"That prior to the 16th day of May, 1871, I prepared a motion for new trial in said cause, and submitted the same to said R. M. Corwine, as counsel, for his opinion and approval; that on the 16th day of May, 1871, I filed the said motion in court; that pending the presentation and submission of said motion, and upon the application of the assistant attorney general for time in the argument thereof extending beyond the ninety days from the rendition of the judgment of the court, provided for appeal to the Supreme Court of the United States, I filed, also, a motion for appeal in these words:

"In Court of Claims."—December Term, 1870.

"M. O. Roberts *et als. vs.* The United States. 2221.

"Now come the plaintiffs in the above-entitled cause, and move the court to grant an appeal in said cause to the Supreme Court of the United States.

THOMAS WILSON,
Attorney for Plaintiffs.

(Signed) EDWARD N. DICKERSON.

That at the same time, as part of the same transaction, and upon the lower half of the same sheet of paper, the Assistant Attorney General made and executed, along with myself and Mr. Dickerson, the following stipulation and agreement, which was also filed:

"It is agreed and stipulated that the above motion shall not in any way affect to its detriment the motion heretofore filed for the granting of a new trial, or in any way prevent a hearing and decision of said motion upon the merits thereof.

(Signed) THOMAS H. TALBOT,
Assistant Attorney General.
EDWARD N. DICKERSON,
For self and Trustees.
THOMAS WILSON,
Attorney for Plaintiffs.

Endorsed: "Filed May 22d, 1871; allowed May 2d, 1872."
S. H. H.

That on the second day of May, 1872, while the motion for new trial under said stipulation was still pending and undecided by the court, the said R. M. Corwine, as I am informed, appeared in court, and prayed an order of court *allowing the appeal* of said cause upon the motion theretofore filed by myself.

That the court, upon his prayer, granted the allowance of the appeal in an order made and entered upon the journal of the court of that day, in the following words. (P. 243.)

"Marshall O. Roberts *et als.*, *vs.* The United States, 2221.

"The claimants, by their attorney, move the court to grant them an appeal to the Supreme Court of the United States as prayed for in their motion, filed on the 22d day of May, 1871.

"*Ordered*, that the appeal be allowed as prayed for."

That the application by said Corwine for said order of court allowing the appeal was entirely without my knowledge or any authority from me; that I was then and had been for

several days absent from the city of Washington, and on that day (May 2d) I was in Dekalb county, Tennessee, from whence I did not return until the 7th day of May, 1872.

That on the 6th day of May, 1872, before my return and without my knowledge or authority, said Corwine, as I am informed, came into court and prayed to have the order of May 2d, allowing the appeal, stricken out, revoked and set aside, which was accordingly done by an order made on that day upon the court journal in the following words: (p. 245.) "Marshall O. Roberts *et als. vs.* The United States, 2221. Mr. Corwine filed a motion to revoke the order of the court allowing an appeal in this case without prejudice to the claimants to renew said motion hereafter. Allowed."

I further say and declare that both said requests or prayers of the said Corwine, and the orders of court of May 2d and 6th, were without any knowledge by or authority from me, and that I left no instructions to have them asked or made, nor did I have any knowledge or suspicion that they would be either asked or made, until after my return to the city, May 7th, when I found they had both been done in my absence.

While Mr. Corwine's act was unauthorized by me, I have no intention of imputing bad faith to Mr. Corwine. His act was, I believe, done with the best intention and for the purpose, as he thought, of being a benefit to the claimants in saving to them their right of appeal.

THOMAS WILSON.

Subscribed and sworn to before me, this 23d day of November, 1872.

SAMUEL H. HUNTINGTON,
Chief Clerk Court of Claims.

"In the Court of Claims United States.

"In the matter of the claim of Marshall O. Roberts *et al.*, trustees, against the United States.

"UNITED STATES OF AMERICA, *ss:*

"Edward N. Dickerson being duly sworn, deposeth and saith that he is one of the above-named claimants, and is acting for his co-trustees and by their express authority in this case.

And this deponent further saith, that Thomas Wilson, Esq., was employed by the claimants as their attorney to bring the suit, and became attorney of record in this court under his partnership name, as the records show. No other person was employed by the trustees at that time.

Afterwards R. M. Corwine, Esq., was employed as counsel, to aid in the argument of the cause; but he was never at any time employed to take the place of the attorney of record, and was never substituted for him in the cause.

In the month of May, 1871, last, the deponent was present in court, with Thomas Wilson, Esq., his attorney, when the motion for new trial was on the calendar for hearing.

The Assistant Attorney General was unprepared to proceed, and desired a postponement, which was granted on the terms contained in the stipulation set forth in the affidavit of Mr. Wilson, and which stipulation was made effectual by the signatures of the attorneys of record of both sides. The case then stood for argument upon that stipulation; and this deponent left it in charge of Mr. Wilson. Mr. Corwine was not in court when this stipulation was made; and this deponent understood that he was ill at home. On or about the 3d of May last this deponent received a letter from Mr. Corwine informing him that he had moved for an allowance of the appeal which had been left pending under the stipulation with the Attorney General as aforesaid. This act was done without the knowledge or authority of the

trustees, and was beyond the power given to Mr. Corwine as counsel in the cause. At once this deponent telegraphed Mr. Corwine to correct the record, and was informed immediately afterwards by Mr. Corwine that he had done so. There has been no act done in consequence of the order of May 2d; and, in fact, the case stands just as it did before that order; and if the record be not now amended according to the fact, great injury is likely to happen to the claimants, in conseqnence of an unauthorized act by a gentleman not their attorney of record.

It is proper to say that Mr. Corwine acted in entire good faith in the matter, but in ignorance of the situation of the case, as he informs the deponent, and under the impression that in the absence of the attorney of record and of the deponent, the claimants were likely to lose their right of appeal.

Sworn and subscribed this 23d November, A. D. 1872, before me.

EDW'D N. DICKERSON.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

At a Court of Claims held at the Capitol, at Washington, on the 23d day of November, 1872.

Marshall O. Roberts and others *vs.* The United States.

The claimants by their attorney, file a motion to the Court to correct its journal record by revoking and striking out the order of allowance of appeal in this case made and entered on the 2d day of May, 1872, and submit affidavits in support of said motion; whereupon the Court refuses to entertain the said motion, because it considers that, since the allowance of appeal so made and entered, it has no jurisdiction thereof.

In the Court of Claims.

Marshall O. Roberts, *et al. vs.* The United States, No. 2,221.

I, Samuel H. Huntington, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of

the proceedings of said Court, and of the motions and affidavats filed therein, as they purport to be.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this 26th day of November, A. D. 1872.

[SEAL.]

SAMUEL H. HUNTINGTON,
Chief Clerk Court of Claims.

Supreme Court of the United States.

DECEMBER TERM, 1872.

MARSHALL O. ROBERTS, *et al.*
v.
THE UNITED STATES.

APPLICATION FOR A MANDAMUS BY PLAINTIFFS TO THE COURT OF CLAIMS.

The judgment of the Court of Claims was adverse to the plaintiff, and the petition was ordered to be dismissed on the 27th February, 1870. On the 16th May, 1870, a motion for a new trial was made by plaintiffs. On the 2d of May, 1870, an application for allowance of appeal was asked by plaintiffs. On the same day a stipulation was filed. It is in the following words, viz:

"It is agreed and stipulated that the above motion shall not in any way affect to its detriment the motion heretofore filed for the granting of a new trial, or in any way prevent a hearing and decision of said motion upon the merits thereof.

THOMAS WILSON,
Attorney for Plaintiffs.
THOMAS H. TALBOT,
Ass't Attorney General.
EDW'D N. DICKERSON,
For self and Trustees."

Thereupon the motion for a new trial was continued to the next term.

On the 2d May, 1872, the motion for allowance of ap-

peal was granted; and on the 8th May, same year, that order allowing an appeal was revoked. On the 18th day of November, the plaintiffs moved to proceed with the argument on motion for new trial, whereupon the court refused to entertain the motion, and made the following order:

"*Ordered*, That the said motion be not entertained by the court, because on the 2d day of May, 1872, an appeal was, on the motion of claimants, allowed in this case to the Supreme Court of the United States; which allowance of appeal, it is considered by the court, was not set aside by the order to that intent made on the 6th of May, 1872, which order was made without jurisdiction in this court after the allowance of the appeal."

ARGUMENT.

The application is for a mandamus to compel the Court of Claims to proceed to hear and determine the motion for a new trial.

The questions for the consideration of the court are not numerous, but they are important.

The authority of the party to appeal is derived from the statute, Chap. XCII, 765, vol. xii, Statutes at Large, sec. 5, of the act 3d March, 1863.

The Supreme Court, intending to exercise the authority conferred by this clause, proceeded to make the "regulations" to govern appeals. Accordingly they promulgated the following Rule, viz:

"RULE III. In all cases an order of allowance of appeal by the Court of Claims, or the Chief Justice thereof in vacation, is essential, and the limitation of time for granting such appeal shall cease to run from the time an application is made for the allowance of appeal."

From the law and this rule, it will be seen that the party desiring to appeal must "*take* his appeal within ninety days after the rendition of such judgment or decree;" and

the time of the application, asking for the allowance, should stop the running of this statute. There is no limitation as to the time within which the application shall be heard; but it may be deferred, within the discretion of the court, to any future day, and the appeal may be "*taken*" at any time thereafter—viz: after the allowance of the appeal. In the words, the "allowance" of the appeal is one thing, and the *taking* of the appeal is another and different thing. This is manifest, not only from the wording of the statute and the rule, but also from the spirit of both. The rule is not intended to, and does not interfere with, the statute in this respect. The rule declares two things, viz: 1st. That the allowance of an appeal shall be by the court or the Chief Justice, in vacation; 2d. That the simple application shall stop the running of the statute. Whereas the statute requires the appeal shall be "*taken*" within ninety days. The rule says it may be "taken" at any future time, provided the party makes the application for the allowance within ninety days. It does not interfere with or modify the law as to taking the appeal. That remains undisturbed, and the party is left to apply for the allowance of and to "take" his appeal at some future day. The allowance is prescribed by the rule, but the appeal must be taken by the party.

The court *allows* him the right to do so, but he must "take" the appeal himself. But does relieve him from the duty of perfecting his appeal by filing the transcript with the clerk of the Supreme Court within the time prescribed by the law and the rule of the Supreme Court. No one can do this, except the party himself. Nothing is perfected, nothing complete, and the appeal not "taken," until this is done. The Supreme Court, in *Ex parte* Russell, (13 Wallace, 671,) uses this language: "But as the case is virtually in the possession and subject to the control of this court *as soon as the appeal is effectively taken*, we see no such reason," &c. This language would seem to convey the idea that there must be an effective "taking" of the appeal. How can it be effective until the party has so far

"taken" the appeal as that he has placed the case beyond the reach of the Court of Claims by transferring the record to the appellate court?

The Supreme Court, in United States *v.* Adams, (6 Wallace, 109,) do not regard the appeal as perfected and effectual until the Court of Claims has taken the subsequent steps pointed out by the rule, and that may be necessary to transfer the case to the Supreme Court. This is the language of the court: "We are, therefore, of opinion, that the filing of this paper was taking the appeal, *and that the delay in the subsequent proceedings* to render it effectual do not touch its validity." (6 Wallace, 109.) This is a clear recognition of the right of the court below to hold on to the case for some purpose, and, if for some, why not for all proceedings which, in the judgment of the court, were deemed necessary to the ends of justice? The application and the stipulation were filed simultaneously and constituted one act, and one was intended to control the other. The application was not to be prejudiced by the continuance, and the new trial was to be heard and determined before the appeal was to be considered effectual. This was the legal effect and the fair meaning of the arrangement. The defendant did not consider, and would not claim, that the appeal was "taken" by the application, and the court concurred. But it was to be considered as in abeyance until and after the motion for a new trial was heard and determined. Thus the case did not pass beyond the jurisdiction of the Court of Claims, but was expressly retained in that court, without prejudice to the rights of all parties. Therefore whatever that court might do afterwards would not, and could not, operate to the prejudice of the rights of plaintiffs, as in anywise affecting their right to have their motion for a new trial heard, and their appeal rendered effectual. In the language of *Ex parte* Russell, "the case is in possession and subject to the control of the court as soon as the appeal is effectively taken," and that is not the case, as we see in Adams's case, until the Court of Claims have done some

acts subsequent to the filing of the application. And until they have so acted, the case has not passed beyond the jurisdiction of the Court of Claims. But if this view were not correct, then the conjoint arrangement of the plaintiffs and defendant will control. It was competent to make it, both parties in interest concurring, and the court will enforce it. While in the absence of the stipulation the application might be considered the taking of the appeal, it will not be so considered where both parties, for their own convenience, agree that it shall not be effective until certain things are done as preliminary. The rights of parties are saved under the law, but are to remain in abeyance.

The refusal, therefore, of the court below to hear the motion for new trial, on the ground that the case had passed beyond their jurisdiction, was improvident. That court insisted that their allowance of the appeal on the 2d of May, 1872, took away their jurisdiction, and that their subsequent order, overruling that order, was void.

I have shown that, if they had no jurisdiction, it was because the appeal was taken when the application for an allowance was made, and that, being controlled by the stipulation, was not effective for that purpose. It is equally as clear that their allowance did not divest them of jurisdiction, as the stipulation controlled their action in that respect as completely as it did the application for an allowance. But it was not an act of jurisdiction. It was merely an authority to the clerk to transmit the record, and could be set aside, like any other mere order, controlling or directing the clerk's action. Hence, when that court set aside that order, they were exercising their unquestioned authority over their own record—an authority never denied or questioned, more especially when both are made at the same time. In Fleming's case, that court pursued this course, and corrected their record after the case was in this court. (6th C. C., 78.)

R. M. CORWINE,
Of Counsel for the Motion.

Supreme Court of the United States.

MARSHALL O. ROBERTS, *et al.*,
vs.
THE UNITED STATES.

MOTION FOR MANDAMUS.

State of the Case and Points.

FACTS.

Marshall O. Roberts, Horace F. Clark, and Edward N. Dickerson, trustees, brought an action against the United States in the Court of Claims, to recover mail pay due them and, Mr. Thomas Wilson was then attorney of d drd. On the 27th of February, 1871, the Court of Claims rendered a judgment in favor of the United States. On the 16th of May, 1871, a motion for new trial [p. 7] was filed. On the 22d of May, that motion was ready for hear ing; but the Attorney-General was not prepared to proceed. [afft., p. 5.] In this state of the case, there being but six days within which the plaintiffs could take an appeal, in case the motion for new trial was decided adversely, it was stipulated between the Attorney-General and the attorney for the plaintiffs, that the motion for appeal should be left undecided, in order that the time required by the Attorney-General for arguing the motion for new trial might be given him without prejudicing the right

of the plaintiffs to take an appeal in case the decision should be adverse. This arrangement was made on the 22d day of May; and the motion for appeal was filed, together with the written stipulation of the Attorney-General, giving effect to the arrangement, [pp. 9 and 10.] The Court of Claims then adjourned, and the motion for new trial was placed upon the docket, to be heard when it was convenient to the plaintiffs and the Attorney-General to argue it.

On the 2d day of May, 1872, the case still remaining under the stipulation, Mr. Corwine, who had been employed as *counsel* in the case a long time after its commencement, moved the Court, without the knowledge or instruction of the attorney of record, or of the plaintiffs, and procured the following entry to be made in the minutes. [p. 3]:—

"The claimants, by *their attorney*, move the Court to grant them an appeal to the Supreme Court of the United States, as prayed for in their motion filed on the 22d day of May, 1871.

"*Ordered*, That the appeal be allowed as prayed for."

On the 6th of May, 1872, Mr. Corwine, under instructions from the plaintiffs [pp. 15 and 16], moved the Court to revoke the order granted on the 2d of May, and the following order was entered on the minutes of the Court:—

"Mr. Corwine filed a motion to revoke the order of the Court allowing an appeal in this case, without prejudice to claimants to renew said motion hereafter. Allowed." [p. 10.]

The records of the Court being in this condition, the motion for new trial came up for argument on the 22d of November

last—the Assistant Attorney-General appearing for the Government—when the Court, *of its own motion*, declined to hear it [. 3 and 4], and entered the following order:—

"*Ordered*, That the said motion be not entertained by the Court, because on the 2d day of May, 1872, an appeal was on the motion of claimants, allowed in this case to the Supreme Court of the United States; which allowance of appeal, it is considered by the Court, was not set aside by the order to that intent made on the 6th of May, 1872; which order was made without jurisdiction in this Court, after the allowance of the appeal."

The plaintiffs then made a motion to correct the record upon the affidavits set out in the paper book [pp. 12 to 17]; but the Court refused to entertain that motion, and entered the following order [p. 16]:—

"At a Court of Claims held at the Capitol, at Washington, on the 23d day of November, 1872.

"Marshall O. Roberts, *et al.*, *vs.* The United States.

"The claimants, by their attorney, filed a motion to the Court to correct its journal record, by revoking and striking out the order of allowance of appeal in this case, made and entered on the 2d of May, 1872, and submited affidavits in support of said motion; whereupon the Court refuses to entertain said motion, because it considers that, since the allowance of appeal so made and entered, it has no jurisdiction thereof."

POINTS.

I.

It is apparent that the order of the 2d of May, 1872, was entered by mistake. The stipulation under which the right to an appeal was saved until after the hearing of the motion for new trial, was made for the convenience of the United States, and was perfectly effectual to the end proposed. The motion of the 2d of May, if it had been intended by the plaintiffs, or by their attorney of record, was a surrender of the right secured by that stipulation. It was moved for by Mr. Corwine, who was not the attorney of record; who acted without authority or instructions; and who was not party to the stipulation which secured the rights of the plaintiffs, and was not in court when it was made.

Justice and good faith require that the plaintiffs should not be deprived of the benefit of the stipulation by any mistake which has been made in the proceedings, and which has wrought no injury to the United States; and it is just to the assistant attorneyg-eneral to say, that he did not object to the hearing of the motion for new trial.

II.

But the court supposed itself hampered by a technical difficulty which seemed to stand in the way of substantial justice; which difficulty was, that the order of the 2d of May seemed to have appealed the case and so annulled the stipulation.

To this difficulty we make these two answers: *First*, that by the order of the 6th of May the court had corrected the error which the order of the 2d of May created in the record; and therefore the motion for new trial should have been heard just as if the order of the 2d of May had not been entered; and

Secondly. We answer that if the order of May 2d was not corrected by the order of the 6th of May, then we are entitled now to have it corrected by the Court of Claims as contrary to the truth.

A. Under the first answer we say that it was competent to the court to correct its own record for any reasons satisfactory to itself; and it appearing that the order of the 2d of May was revoked by the order of the 6th of May, it must be assumed that the court acted with sufficient reason in so revoking the order of the 2d of May; and as it appears from the record itself that Mr. Wilson was the attorney of record, and that the order of the 2d of May was entered without his name or authority, there was ample power in the court to correct it by the order of the 6th of May. We therefore say that in this view the court should be directed to hear the motion for new trial under the stipulation; because, upon the record of the court itself, there was no appeal pending on the 22d of November when that motion for new trial was called up for argument.

In the case of Fay *vs.* Wenzell, 18th Cush. 317, the court says: "Having authority to correct their own record, it is to be presumed that any amendment of the record made by them will be in accordance with the fact." It might be true enough that the order of May 6th would be ineffectual to recall an appeal *if well taken*, and yet be entirely effectual to correct an order purporting to take an appeal, which had been entered by mistake and without authority. If the order of May 6th can be justified for *any reason*, it should be held to be effectual, even though in some other view it might be unauthorized.

B. But under the second reason, it is undoubtedly the right of the plaintiffs to have the record corrected and the motion for new trial heard. The order of the 2d of May sets out that the

"*attorney*" of the plaintiffs moved the court for that order. This was not the truth. The attorney for the plaintiffs was Thomas Wilson, who was not in Washington, and who had not authorized that motion to be made. Mr. Corwine was in some sense *an* attorney for the plaintiffs—that is, he was employed as *counsel* in the cause; but he was not "*their attorney*" of record, nor was he authorized to affect the record in the case by any motion which he might make.

The Court recognizes but one attorney of record, and he it is who brings the suit. Other counsel who appear in the cause afterward are not attorneys in the case, in the sense in which the attorney of record holds his office. The Court will not permit a new attorney to be substituted without leave of the court; nor will they permit any other attorney to affect the record. It is true that other counsel do move in the court; but they are allowed to do so under the presumption that they are acting by the instruction of the attorney of record; and the name of the attorney of record should appear on any order or paper in the cause. If it should turn out that neither the parties nor their attorney of record had authorized a motion to be made, the record which recited that the parties, by "their attorney," have moved the court, would be false; and it is entirely immaterial, so far as the effect of the motion on the rights of parties is concerned, whether it was made in good faith, or with intent to injure them. If the parties by their attorney of record, choose to adopt it, they ratify the act; if not, they can not be bound by it. (Ginden *vs.* Moore 1 Barn. and Cres. 654.)

There is no dispute about the facts in this case. It was the intention, both of the government and of the plaintiffs, to argue the motion for new trial, and to save the right of appeal in case that motion should fail. Mr. Corwine was not the attorney of record, and was not authorized to affect the record

by any motion which he might make. And the act he did, although done in entire good faith, was at once disavowed by the plaintiffs, and corrected by the leave of the court on the record. Under these circumstances, if the court refuse to hear the motion for new trial, they will defeat the object agreed to by both parties; they will deprive the plaintiffs of a substantial right, which was put in jeopardy for the benefit of the government; and they will do this, because, as we say, a false record has been made.

Under these circumstances, *mandamus* is the only remedy for the plaintiffs. If this court shall be of opinion that, as the record stood when corrected by the order of the 6th of May, the motion for new trial should have been heard, then we ask a *mandamus*, for that reason.

If, however, this court shall be of opinion that the order of the 6th of May was ineffectual, then we are entitled to a *mandamus*, that it may be decided whether the record of the 2d of May is true or false. The court of claims has refused to try that question; alleging, as a reason for its refusal, that the case was appealed by the very order whose truth is denied and called in question. Obviously the Court of Claims erred in this; for it can not be known whether the case was appealed or not, until it is decided whether the record, purporting to grant the appeal, is true or false.

It is just to the Court of Claims to say, that his Honor the Chief Justice, in announcing the refusal of the Court to hear either the motion for the new trial, or the motion to correct the record, said that it was for the interest of the plaintiffs that the right of the Court to hear those motions should be decided by *mandamus;* otherwise, after a new trial had been granted, it might be held by the Supreme Court, upon appeal, that the Court of Claims had no jurisdiction under the cir-

cumstances, and so the plaintiffs might lose their rights. The Chief Justice expressed the wish of all the judges to hear the motion for new trial, if they could be relieved from the technical difficulty which the state of the record seemed to exhibit; and in this situation we present ourselves to this Honorable Court to have it determined, either that the Court of Claims should hear the motion for new trial, on the record as it stands; or should hear our application to correct the record.

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